U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26062169

Date: JUN. 16, 2023

Appeal of Vermont 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 Vermont Service Center revoked the petition's approval, concluding the record did not establish a bona fide job offer existed at the time of filing the petition. 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.

I. LAW

The Act at Section 214(i)(1), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires: (A) the theoretical and practical application of a body of highly specialized knowledge, and (B) 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) adds a non-exhaustive list of fields of endeavor to the statutory definition, while the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the proffered position must also meet at least one of four criteria to qualify as a specialty occupation.

The regulation at 8 C.F.R. § 214(h)(11)(iii)(A) states the director shall send to the petitioner a notice of intent to revoke (NOIR) the petition if he or she finds that:

> (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as 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 any of the requirements for admission, extension, and maintenance of status of temporary employees under 8 C.F.R. § 214(h); or

(5) The approval of the petition violated 8 C.F.R. § 214(h) or involved gross error.

The regulation at 8 C.F.R. § 214(h)(11)(iii)(B) mandates that the NOIR contain "a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. . . . The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part."

II. ANALYSIS

A petitioner has the burden of proof to establish that a bona fide job offer exists at the time of filing, and that it will employ the foreign national in the specialty occupation. In addition, the petitioner must establish eligibility at the time of filing the petition and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1). While we do not discuss each piece of evidence individually, we have reviewed and considered each one.[1]

The Petitioner filed its petition in October 2020 to amend and extend the Beneficiary's H-1B status as a financial analyst. It submitted a labor condition application (LCA) certified for a position under the Standard Occupational Code (SOC) 13-2051.00 for Financial and Investment Analysts. At the time of filing, the Petitioner stated it employed four people and described itself, in verbatim, as follows:

> [A] Delaware based company formed and registered in [redacted] 2016 as a start-up company from ground zero with a very less capital and big business plan for Multi-location Retail Stores as well as wholesale recommendations for tobacco, cigar, tobacco accessories and general merchandise items to small corner stores, Gas stations with convenience stores and liquor stores in Delaware and around surrounding states and acquire low running business.

The record does not reflect the Petitioner has multiple locations but rather only the location where the Petitioner has stated the Beneficiary will work. The Director informed the Petitioner in a May 2022 NOIR that the Petitioner had not established a bona fide job offer existed for the Beneficiary at the time of filing the petition. Specifically, the NOIR explained that USCIS conducted a site visit and

[1] When USCIS provides a reasoned consideration to the petition, and has made adequate findings, it will not be required to specifically address each claim the petitioner makes, nor is it necessary for it to address every piece of evidence the petitioner presents. Guaman-Loja v. Holder, 707 F.3d 119, 123 (1st Cir. 2013) (citing Martinez v. INS, 970 F.2d 973, 976 (1st Cir.1992); see also Kazemzadeh v. U.S. Atty. Gen., 577 F.3d 1341, 1351 (11th Cir. 2009); Casalena v. U.S. INS, 984 F.2d 105, 107 (4th Cir. 1993).

could not verify the Beneficiary's duties in a Financial Analyst position. The NOIR further stated that:

> The site visit and subsequent investigation . . . revealed that the beneficiary appears to be a manager actively engaged in the daily operations of the business and not an employee tasked with performing the duties of a Financial Analyst . . . For instance, . . . the petitioner provided financial documents along with copies of email correspondence in an attempt to show the beneficiary actively performs the duties of a Financial Analyst for the petitioner. However, this documentation . . . contained no analysis of profit variance, revenue forecasts, or recommendations for management on how to proceed based on the data gathered; which should be well within the purview of the aforementioned duties associated with the position. Instead, the documents and email correspondence . . . show the beneficiary acts as a representative of the company, conducting daily operations of the business, and acting as a point of contact for business partners. Additionally, a review of the petitioner's company profile on the Better Business Bureau of Delaware website shows the beneficiary as the principal contact and manager of the organization . . . .

The Director reviewed the Petitioner's NOIR response, determined the Petitioner had not overcome the identified deficiencies, and revoked the petition's approval. On appeal, the Petitioner asserts the Director did not consider all the evidence and improperly reviewed it under a heightened standard of review. Upon de novo review, we conclude the Petitioner has not overcome the shortcomings the Director identified.

To establish the Beneficiary's work as a financial analyst, the Petitioner submits over 3,000 pages of sales transaction reports listing what appears to be each individual retail item the Petitioner sold between 2017 and 2022. The reports feature a simple bar graph comparing the sales levels of each month in the relevant year.[2] The sales transaction printouts may serve as evidence of the Petitioner's ongoing operations during those years; however, they are not probative in this matter, as they constitute a collection of cash register point of sale transactions and include no financial analysis. Nor is it even apparent whether the Beneficiary ran these reports. Even if we considered these reports as evidence that the Beneficiary performs the duties of a financial analyst, many of these reports were printed in April 2021, which does not sufficiently establish the Beneficiary performed this work as of the petition filing. For these reasons, we conclude this evidence does not overcome the Director's concerns.

Regarding the pre-2021 documents, the Petitioner reiterates on appeal that "getting copies of them is just not possible," as the Petitioner's ownership changed twice since 2016 and "all new systems and software were installed." The Petitioner further explains, "financial reports and business-related research as well as analysis reports submitted to the old owner were stored in the old systems that were removed. At the time we did not have any reason to think keeping all of those old records would be

[2] The Petitioner previously offered this evidence before the Director, and it remains present for the appeal. Although the Petitioner "recognizes this is a duplicate submission," it argues the Director "wholly ignored" this evidence, which justifies its resubmission. However, such was not the case: the Director specifically stated in the NOIR that "this documentation was simply a bar graph of register receipts and contained no analysis of profit variance, revenue forecasts, or recommendations for management on how to proceed based on the data gathered."

necessary. There are some pre-2021 reports that remain and are being provided." As stated, the Petitioner requested to amend and extend the Beneficiary's employment as a financial analyst when it filed its petition in October 2020. Therefore, a claim that the Petitioner "did not have any reason to" keep the work product of an already existing H-1B employee is not persuasive.[3]

On appeal, the Petitioner asserts that when primary evidence is not available, USCIS must consider secondary evidence in accordance with 8 C.F.R. § 103.2(b)(2)(i). We agree. However, that regulation also states that "[s]econdary evidence must overcome the unavailability of primary evidence," which, in this matter, it does not. First, the Petitioner has not adequately explained what specific documents serve as secondary evidence in this matter. Second, given the gravity of the site visit's findings, the Petitioner's letter listing the Beneficiary's duties, for example, is insufficient to meet the preponderance of the evidence standard and therefore does not overcome the claimed unavailability of primary evidence.

The Petitioner asserts that photos of the Beneficiary's office, the Petitioner's organizational chart, and the Petitioner's state corporation documents demonstrate the operation manager's oversight of the Beneficiary and his specific job duties as a financial analyst. We do not see any of these documents within the Petitioner's appeal. But even if they had been submitted, they would likely not have carried the Petitioner's burden. While an organizational chart could have placed the operation manager above the Beneficiary in the Petitioner's organizational hierarchy, these documents would not demonstrate the Beneficiary performs specialty occupation work as a financial analyst.

To evidence the Beneficiary's work, the Petitioner provided documents concerning two out of state hotels. In the NOIR, the Director explained that:

> [T]he provided "revenue forecasts" are a historical record of day to day occupancy and revenue for a hotel for the years of 2018 and 2020. While you state in your response letter that the beneficiary has been compiling and analyzing this financial information, no analysis and no forecast of this information is present in your response. . . . it is unclear where the work to purchase an out of state hotel fits within the duties of a Financial Analyst while also benefiting the operational and financial efficiency of a tobacco retail and wholesale company.

On appeal, the Petitioner explains that the Beneficiary "explored a potential business opportunity by investing in a hotel," an activity within the purview of a financial analyst's role. However, the Petitioner has insufficiently documented and explained how acquiring hotels fits within the Petitioner's business as a Delaware tobacco and liquor store. Even if it had provided a more detailed explanation, we would still observe that the Petitioner had not provided sufficient, independent, and objective evidence of the Beneficiary's role in this "business opportunity" such that we could conclude he performed the duties of a financial analyst. For instance, the revenue forecasts have no identifying features that would suggest the Beneficiary created them. The email exchanges concerning loans for a Pennsylvania hotel indicate that multiple individuals from the lending company share the Beneficiary's surname. Without further explanation, the potential familial relationship between the

[3] USCIS initially approved the Petitioner's prior petition for a financial analyst position on behalf of the Beneficiary ( ) for a validity period beginning on May 12, 2017.

parties raises questions regarding the emails' reliability that diminish their persuasive value. Regarding the Wisconsin hotel, the email exchanges contain unusual font changes, irregular spacing, incorrect capitalization, and awkward turns of phrase which, when considered collectively, lead us to question the credibility of these documents as well. Even if this evidence were credible, it would not demonstrate the Beneficiary performs specialty occupation financial analyst work.

The Director's NOIR further noted:

> . . . [In] the correspondence with [redacted] the beneficiary is the individual tasked with procuring and negotiating the acquisition of vendors and property for the company. This evidence supports USCIS' finding that the beneficiary is a manager of the company actively engaged with the daily operations of the business, rather than an employee tasked with performing the duties of a Financial Analyst as specified in the petition.

On appeal, the Petitioner describes the Beneficiary's activities as being "actively in contact with the vendors of company products for the purposes of product research, statewide exclusivity, and cost analyses," which "falls within the scope of what Financial Analysts do." The Petitioner states that "[a]n example of the Beneficiary's work in this area was the research, analysis, and other tasks to discover and then execute a new deal with Ignite International . . .[the] Beneficiary was not signing contracts with [redacted] to buy vaping products for a retail store, but getting statewide wholesale exclusivity for [redacted] vaping products in Delaware."

While we acknowledge these assertions, the record does not contain evidence supporting them. For instance, the Petitioner did not provide details of how the Beneficiary discovered or executed the deal, the contracts it has with [redacted] or any documentation suggesting it has wholesale exclusivity of their products. In addition, the Petitioner has not provided samples of the Beneficiary's product research or cost analysis of [redacted] products. Rather, the Petitioner provided a generalized letter on [redacted] letterhead, addressed to "Dear Valued Customer." The letter neither mentions the Petitioner nor makes any reference to wholesale exclusivity. Although the accompanying emails exchanged between the Petitioner's Gmail address and a purported representative of [redacted] appear to contain a wholesale price list as an attachment, the emails are undated and do not feature any research or analysis. Accordingly, the Petitioner has not substantiated its statement that the Beneficiary's contact with vendors was "for the purposes of product research, statewide exclusivity, and cost analyses."

The Petitioner provided portions of quarterly or year-to-date business performance reports for its business across portions of the years 2021 to 2023. As these are 2021 to 2023 reports, they do not show that the Beneficiary was performing financial analyst duties at the time of filing. Additionally, the business performance reports do not feature analysis the Beneficiary conducted, as opposed to that which [redacted] financial analysis software compiled.[4] The reports contain charts and graphs, as well as cash flow, profit and loss, and trend analysis, which appear to be part of the Petitioner's selected [redacted] software subscription. The evidence does not demonstrate, for example, that the Beneficiary

[4] The Petitioner provided screenshots of a computer screen running the financial software. However, there is little evidence connecting these screenshots to any particular person's work.

compiled and provided the data or information [redacted] utilized to produce the report or that he added any analysis or insight to what the software generated. Stated simply, the record does not demonstrate that running [redacted] software requires specialized knowledge or that the Beneficiary performed specialty occupation work in generating or processing these reports. Therefore, the [redacted] performance reports do not support a finding that a bona fide job offer existed at the time of filing.

Finally, the Petitioner references additional evidence it claims to have submitted that we do not see. For example, the Petitioner references meeting minutes that demonstrate the Beneficiary's presentation of financial findings and suggestions to management. Even if those minutes were present, it is difficult to see how they could possibly overcome the numerous deficiencies the Director identified. Similarly, even if the referenced Beneficiary-prepared 2023 business plan had been submitted, this would not establish a bona fide job offer existed at the time of filing, nor would it, either individually or in combination with the other evidence, demonstrate by a preponderance of the evidence that the Petitioner has qualifying work for the Beneficiary to perform.[5]

For all of these reasons, the Petitioner has not overcome the concerns set forth in the Director's decision revoking the petition's approval.

III. CONCLUSION

The Petitioner has neither established that a bona fide job offer existed at the time of filing nor that it has or will employ the foreign national in a specialty occupation. For the foregoing reasons, the Director's decision stands, and the petition remains revoked.

ORDER: The appeal is dismissed.

[5] The Director did not revoke the petition's approval based upon a conclusion that the Petitioner's proffered position duties, as described, do not fit within the financial analyst occupation or that a financial analyst is not a specialty occupation. Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve such specialty occupation issues. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); see also Matter of L-A-C-, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).