U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25573088

Date: MAY 08, 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 claimed to have had 90 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 their 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 performed a search of U.S. Citizenship and Immigration Services (USCIS) records and found that the Petitioner "obtained at least 73 Form I-129 approvals in the last three years" compared to [its] claimed 90 U.S. employees." This appears to exceed the 50% threshold for the fee.

The Director issued a request for evidence (RFE) informing the Petitioner that it did not appear exempt from the fee. The Director provided an opportunity for the Petitioner to provide specific evidence to establish it was exempt from the additional fee. In response, the Petitioner provided an unsworn letter from the Petitioner's COO stating that it has 78 employees out of which 18 are in H-1B status, copies

of the Petitioner's Form 941, Employer's Quarterly Federal Tax Return for Quarters 1 and 2 of 2022, and a list of the Petitioner's purported employees as of May 9, 2022. Despite the Director's specific request, the Petitioner neglected to submit payroll records for all employees for the pay period in effect when they filed the petition and the one preceding.

The Director denied the petition because the Petitioner did not submit the requested pay records, concluding that without the payroll records they could not evaluate whether the Petitioner was exempt from the fee imposed by Public Law 114-113. The Petitioner also did not explain why there was a discrepancy in the number of employees it listed on the Form I-129 (which is signed by the Petitioner under penalty of perjury) and the number of employees it represented it was employing on the date of filing. This is a significant discrepancy because the Petitioner's submitted Forms 941 reflected that the Petitioner employed somewhere between 106 and 110 employees in the first two quarters of 2022.

On appeal, the Petitioner provides a new unsworn letter claiming it employs 109 individuals, 26 of whom are in H-1B status. It submits for the first time on appeal the previously requested payroll records it had neglected to provide with the RFE response. It also submits a letter from a representative of a payroll company to confirm that the Petitioner had 109 employees in May 2022. The appeal attributes its discrepant representations regarding the number of individuals it employs to a "formatting mistake" at the time they were "transferring the list to a .pdf format" resulting in a "page or so of employees [being] lost."

Our authority over the USCIS service centers, the office that adjudicated the immigrant petition, is comparable to the relationship between a court of appeals and a district court. So based on a de novo review of the record, we adopt and affirm the Director's decision that the Petitioner did not establish that it was exempt from paying the required fee imposed by Public Law 114-113 with the following comments. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Abdulai v. Ashcroft,* 239 F.3d 542, 549 n.2 (3rd Cir. 2001) (noting that the "vast majority of courts of appeals" approve of adopting and affirming the decision below); *Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F3d. 5, 8 (1st Cir. 1996) (joining eight U.S. Courts of Appeals in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case). The Director gave individualized consideration to the evidence the Petitioner submitted with its RFE response to determine it did not establish its exemption from Public Law 114-113.

Moreover, instead of providing new evidence which could overcome the Director's decision, the submission on appeal raises new concerns regarding the Petitioner's prior representations. For example, the Petitioner provided a letter with the RFE response advising it had 78 employees even though it submitted Form 941 reflecting over 105 employees in the first two quarters of 2022. At appeal, the Petitioner's letter expresses an employee count of over 100 individuals and attributes the revision to a "formatting mistake" in "transferring the [employee] list to a .pdf format." This claim is doubtful when confronted with the fact that other documentation contemporaneously submitted with the RFE response reflected over 100 employees.

On appeal, the Petitioner provides its payroll records for the first time despite the Director's specific request for them in the RFE. Multiple precedent decisions address whether newly submitted evidence

on appeal will be considered. *See Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Jimenez*, 21 I&N Dec. 567, 570 n.2 (BIA 1996). A petitioner may not make material changes to a petition, to its claims, or to the evidence in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 2I&N Dec. 169, 175 (Assoc. Comm'r 1998). As the Director correctly concluded in their well-reasoned decision, USCIS was unable to verify the Petitioner's statements about how many individuals it employed or even that they actually employed them. The Petitioner's submission of these documents at appeal lacks explanation for why they were not provided when requested with the RFE response. The Petitioner also did not provide any explanation for the discrepancy between the 73 H-1B approvals it has obtained in the last three years and the lower number of H-1B employees it states it currently employs.

The Petitioner should resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The Petitioner's inconsistent statements and their submission of documents containing information which conflicts with other documents submitted in the record raises doubts about the veracity of the Petitioner's claims. Doubt cast on any aspect of evidence submitted in support of a visa petition may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. *Id.*

The record does not establish, through any reliable evidence, the actual number of the Petitioner's employees at the time of filing the petition and the percentage of which were in H-1B, L-1A, or L-1B status to determine whether the Petitioner 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.