U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21179714

Date: MAR. 28, 2022

Appeal of Vermont Service Center Decision

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

The Petitioner, a commercial banking company, seeks to temporarily employ the Beneficiary as an "assistant vice president" under the H-1B nonimmigrant classification for specialty occupations. 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 denied the petition, concluding that the record did not establish that the proffered position is a specialty occupation. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act; Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter de novo. See *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we conclude that a remand is warranted in this case.

I. ANALYSIS

The Petitioner seeks to employ the Beneficiary in-house as a "senior vice president" and designates the proffered position on the labor condition application (LCA)[1] as being located within the "Risk Management Specialists" occupational category, corresponding to the standard occupation classification (SOC) code 13-1199.02 at a level II wage. Specifically, the Director concluded that the record contained insufficient evidence to establish that the position qualifies as a specialty occupation under at least one of the four regulatory criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4).

[1] The Petitioner is required to submit a certified LCA to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar duties, experience and qualifications who are performing the same services. See Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a).

On appeal, the Petitioner presents additional evidence and maintains that the proffered position is a specialty occupation. The new evidence submitted on appeal includes an evaluation of the position, the Beneficiary's work samples, and a more detailed description of the proffered position's duties. The Petitioner asserts this new evidence, when considered together with the previously submitted documents, demonstrates that the proffered position is a specialty occupation.

In most cases, our decision will be limited to the evidence in the record at the time of the unfavorable decision, as the appellate regulations have never explicitly allowed for the submission of evidence with regular appeals. Accordingly, when new evidence is submitted with an appeal, we will apply both Matter of Soriano, 19 I&N Dec. 764 (BIA 1988), and Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988), to determine whether we will consider that evidence as we adjudicate the appeal. In applying the framework of those cases to the matter at hand, we note that the request for evidence (RFE) provided notice to the Petitioner that an evidentiary deficiency prevented the Director from determining whether the proffered position was a specialty occupation.

While the Petitioner had a reasonable opportunity to respond to the evidentiary deficiency through the RFE process and, in fact, did provide an RFE response which addressed the question of whether the proffered position is specialty occupation, we conclude this new evidence on appeal appears to be directly relevant to the Petitioner's claim that the position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (4). With regard to this additional evidence submitted, while we note that it provides more details on how the proffered position is a specialty occupation, we do question whether the Petitioner was in possession of and/or capable of submitting these documents within its RFE response. The AAO is not required to consider this additional evidence submitted on appeal, and we conclude that the Director is the more appropriate party to consider its impact on the Petitioner's eligibility for the benefit sought. Therefore, we will remand the matter so that the Director can consider it in the first instance.

II. CONCLUSION

Accordingly, the matter will be remanded to the Director to (1) consider the consider the new evidence and determine whether the Petitioner established that the proffered position is more likely than not a specialty occupation and (2) to make a determination as to whether the statutory and regulatory requirements for classifying the Beneficiary as a H-1B nonimmigrant have been met. The Director may request any additional evidence considered pertinent to the new determination and any other issue.

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