U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26589135

Date: JUN. 14, 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 nonimmigrant 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 petition was filed with a corresponding labor condition application and further that the Petitioner's proffered position was not a specialty occupation. 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. THE PROCEEDINGS BELOW

The Petitioner is offering the Beneficiary the position of consultant. The petition included a Department of Labor (DOL) ETA Form 9035 and 9035E Labor Condition Application for Nonimmigrant Workers (LCA) certified for a position located within the "Computer Systems Analysts" occupational category corresponding to the Petitioner's self-categorization within the Standard Occupational Classification (SOC) Occupational Information Network (O*NET) code 15-1121.00.[1] The Petitioner attested they are not an H-1B dependent employer in the LCA. According to the Petitioner, the proffered job requires a minimum of a bachelor's degree in computer engineering, user experience design, information technology, or a related field.

[1] After the filing of the petition, the Department of Labor's Bureau of Labor Statistics advised that the "Computer Systems Analysts" entry at 15-1121.00 was no longer in use and to use the "Computer Systems Analysts" entry at 15-1211.00. The Petitioner's proffered job description aligns with the new category.

The Director issued a request for evidence (RFE) advising the Petitioner that they noted concerns with the accompanying LCA such that it may not correspond to their proffered job. The Director queried whether the SOC occupational category the Petitioner selected related to the duties of the Petitioner's proffered job. And the Director questioned whether the Petitioner was an H-1B dependent employer contrary to what the Form I-129 and LCA reflected. Finally, the Director requested additional evidence to evaluate if the Petitioner's proffered position was a specialty occupation.

In their RFE response, the Petitioner provided an expanded job description with percentages of time spent on each duty, an advisory opinion from [redacted] professor of computer and information sciences, [redacted] University, a copy of the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) entry for "Computer Systems Analysts," a copy of the DOL Occupational Information Network (O*NET) Summary Report, and USCIS' Fiscal Year 2014 Annual Report to Congress on the "Characteristics of H-1B Specialty Occupation Workers" to support the specialty occupation nature of the proffered consultant position. The Petitioner also submitted a chart in its response which compared the duties of the proffered job to the SOC category they selected on the LCA. And the Petitioner's response stated that the Petitioner was not a dependent employer but did not provide any of the Director's requested evidence nor any explanation why evidence was not available in support. The Director denied the petition because the Petitioner did not establish that they were not an H-1B dependent employer and the proffered job was not a specialty occupation.

II. THE DIRECTOR'S DECISION

We conclude that the Petitioner's proffered position of consultant is a specialty occupation. The *Handbook* entry for "Computer Systems Analysts" reflects that a "bachelor's degree in computer and information technology or a related field" is "typically" the minimum requirement for entry into the occupation. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Computer Systems Analysts (Sept. 8, 2022), https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm. The fields of study identified by the *Handbook* are closely related such that they constitute a common specialty required to perform the duties of positions located within this occupational category. So the evidence in the record established that the Petitioner's proffered consultant position qualifies for classification as a specialty occupation as the term is defined at section 214(i)(l) of the Act and 8 C.F.R. § 214.2(h)(4)(ii) as it requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty or its equivalent. And the record established that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position, and therefore also satisfies 8 C.F.R. 214.2(h)(4)(iii)(A)(*1*). So we will withdraw the Director's decision in part and conclude that the Petitioner's proffered position is a specialty occupation. And, although the Director made no specific conclusions in their decision, we also conclude that the Petitioner's evidence supports their contention that the occupational classification listed in the LCA corresponds to the proffered job. But the LCA is nevertheless discordant with the petition and we must dismiss the appeal for the below reasons.

III. NON-CORRESPONDING LABOR CONDITION APPLICATION

A Petitioner seeking to file an H-1B petition must accompany that petition with a certified LCA. Section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.731(a). In addition, a 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). A certified LCA memorializes the attestations a petitioner makes regarding the employment of the noncitizen in H-1B status.[2]

Whilst DOL is responsible for certifying that the Petitioner has made the required LCA attestations, United States Citizenship and Immigration Services (USCIS) evaluates whether the submitted LCA corresponds with the Petitioner's H-1B petition. *See ITServe Alliance, Inc. v. DHS*, 590 F. Supp. 3d 27, 40 (D.D.C. 2022) (noting that 20 C.F.R. § 655.705 requires USCIS "to check that the [H-1B] petition matches the LCA"); *see also United States v. Narang*, No. 19-4850, 2021 WL 3484683, at *1 (4th Cir. Aug. 9, 2021)(per curiam)("[USCIS] adjudicators look for whether [the] employment [listed in the H-1B petition] will conform to the wage and location specifications in the LCA"). USCIS does not supplant DOL's responsibility with respect to wage determinations when it evaluates the information as contained in the LCA to ensure it "corresponds with" the content of the H-1B petition. *See* 20 C.F.R. § 655.705(b) ("DHS determines whether the petition is supported by an LCA which corresponds with the petition…."). *See also Matter of Simeio Solutions*, 26 I&N Dec. 542, 546 n.6 (AAO 2015).

Section 212(n)(3)(A) of the Act, 8 U.S.C. § 1182(n)(3)(A), defines an H-1B dependent employer as an employer that:

> (i)(I) has 25 or fewer full-time equivalent employees who are employed in the United States; and (II) employs more than 7 H-1B nonimmigrants;
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> (ii)(I) has at least 26 but not more than 50 full-time equivalent employees who are employed in the United States; and (II) employs more than 12 H-1B nonimmigrants; or
>
> (iii)(I) has at least 51 fulltime equivalent employees who are employed in the United States; and (II) employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

An LCA which does not accurately indicate the employer's H-1B dependency status cannot be used to support a H-1B petition. 20 C.F.R. § 655.736(g)(1).

The Petitioner indicated in the petition and on the accompanying certified LCA that they had 30,000 employees and were not an H-1B dependent employer. As USCIS records reflected that the Petitioner had received approvals for over 10,000 H-1B petitions in the three years prior to the filing of the petitioner, the Director questioned whether the Petitioner was an H-1B dependent employer.

[2] *See* 20 C.F.R. § 655.734(d)(1)-(6).

The Director notified the Petitioner of their concerns with the Petitioner's dependency on H-1B employees and issued an RFE. The Director may request additional evidence when they evaluate eligibility for immigration benefits. 8 C.F.R. § 103.2(b)(8). The Director suggested that, if the Petitioner was not an H-1B dependent employer, they submit evidence which could include but was not limited to:

- A statement explaining how many U.S. and H-1B employees the Petitioner employed at the time the petition was filed;
- Copies of the Petitioner's Forms 941, Employer's Quarterly Federal Tax Returns, for the quarter immediately prior to the filing date of the petition and the quarter the Petitioner filed the petition; or
- The Petitioner's payroll summaries showing how many workers the Petitioner paid wages to for the pay period immediately prior to the filing date of the petition and the pay period that the Petitioner filed the petition.

The Petitioner stated in their response that they were a member of an unidentified group of employers required to be treated as a "single employer" under the Internal Revenue Code (IRC) at 26 U.S.C. § 414(b), (c), (m), or (o). They stated that the regulations at 20 C.F.R. § 655.736(b) state that an employer treated as a "single employer" for purposes of the IRC is also treated as a "single employer" for purposes of determining H-1B dependency. The Petitioner contends that application of the "single employer" rule reflects that they have 76,000 employees. They also state that they have 6,700 employees in H-1B status, which is below the 15% threshold set in the regulations to determine whether an employer is H-1B dependent.

We acknowledge the Petitioner's assertion of their treatment as a "single employer" under the relevant section of the IRC. But their assertion is not supported by applicable evidence in the record. Aside from their statement contained in their larger response to the RFE, the Petitioner provided no documentary evidence in support. 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). 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. *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 274 (1994). The standard of proof in immigration proceedings is a preponderance of the evidence. *Chawathe*, 25 I&N Dec. at 375-76. The Petitioner did not provide the quarterly tax returns or the payroll summaries the Director requested. And they did not give any reasons for why they did not or could not produce additional documentation to support their statement. Nor did they provide any alternative documentation or evidence in support. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 156 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without material, relevant, or probative evidence a petitioner generally cannot meet their burden of proof to establish eligibility for an immigration benefit by a preponderance of the evidence.

On appeal the Petitioner submits new evidence that it could have submitted with their RFE response in the form of a copy of the relevant sections of the IRC describing an "affiliated service group," a letter from the Internal Revenue Service (IRS) purporting to demonstrate that the Petitioner is part of

a group that is considered an "affiliated service group" and so a "single employer" under the IRC, a generic list of companies the Petitioner is purportedly affiliated with, a USCIS Form I-797, Approval Notice for a L-1 blanket petition with a list of [redacted] affiliated entities, an organizational chart, and an affidavit from the Petitioner's lead immigration specialist.[3]

The new evidence the Petitioner provides for the first time on appeal is not material, probative, or relevant to the Petitioner's H-1B dependency status. The copy of the relevant sections of the IRC does not reliably indicate the specific section or basis contained at 26 U.S.C. § 414(b), (c), (m), or (o) under which the Petitioner claims their status as a "single employer." The Petitioner's lead immigration specialist provides an affidavit at appeal which states that the Petitioner is a "single employer" under 26 U.S.C. § 414(m), or employees of an "affiliated service group." The letter states the "correct" number of employees is 87,000 based on their inclusion in the "affiliated service group" and also states the total number of employees per their records is 6,700, concluding that they are therefore under the 15% threshold demarcating H-1B dependent status. But the record does not contain any material, relevant, or probative documentation of any of the factors contained in the IRC to indicate an affiliated service group such as ownership, shareholding amounts, or whether there is the performance of services by [redacted] Consequently, the figures and information contained in the Petitioner's lead immigration specialist's affidavit is uncorroborated. And the letter from the IRS' director of EP Ruling & Agreements that the Petitioner purports demonstrates the [redacted] group of companies is an "affiliated service group" contains points of concern. Specifically, the letter is not addressed to the petitioner but to [redacted] the Petitioner in this matter is [redacted] And the letter refers to a favorable determination applying to the status of [redacted] pension plan under the IRC but does not reflect whether the Petitioner or any other entity has any connection to the stated pension benefit or is in an "affiliated service group" under the IRC with [redacted]. The copy of the single employer list supposedly maintained in the Petitioner's master public access file is simply that – a list of companies. There is no additional information on the list provided or any other source which would support the Petitioner's contention that the list comprises a group of companies that are a "single employer" under the any of the relevant sections of the IRC or what their ownership structure, shareholder, partnership status, or service to one another is. The same is true for the list of affiliated entities accompanying a Form I-797 L-1 Blanket Petition Approval Notice approved on behalf of [redacted] The list of affiliated entities contains a list of U.S. and internationally based companies affiliated with [redacted] and the Petitioner is contained in this list. But there is no additional information or documentation provided that would indicate whether the affiliated entities on the list based in the United States would constitute a "single employer" under any of the relevant sections of the IRC. And one cannot determine from this list alone whether the qualifying relationship shared by the entities on this list would be sufficient to constitute a relationship supporting a "single employer" designation under the IRC. Whilst the Petitioner provides an

[3] The Petitioner was notified of the requirement to submit evidence of their H-1B dependency status in the Director's RFE and given a reasonable opportunity to provide the evidence. But the Petitioner did not provide any evidence or documentation with the RFE response. 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). As stated above, the Director requested relevant evidence at the time of the RFE response that the Petitioner provides for the first time on appeal. Nevertheless, we have chosen to exercise our discretion in this matter and evaluate the new information, documentation, and explanation provided by the Petitioner for the first time on appeal. But we have concluded that it is not material, relevant, or probative to the threshold question of whether the Petitioner is an H-1B dependent employer.

organizational chart purporting to reflect the relationship between the Petitioner and other entities affiliated and related to [redacted] there is no evidence present in the record that would support these relationships between these companies and how the relation of these companies to each another establishes their status as an "single employer" under any relevant section of the IRC. And if it cannot be determined under what basis the Petitioner is a "single employer" under the IRC, we cannot conclude that the Petitioner correctly identified themselves as an employer who is not H-1B dependent.

IV. CONCLUSION

As the certified LCA in the record identified the Petitioner as an employer that is not H-1B dependent, and the Petitioner has not established by a preponderance of the evidence that they are not H-1B dependent, the LCA is not in correspondence with the proffered position. An H-1B petition cannot be approved without a corresponding LCA. See section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a). So the petition is unapprovable as filed.

ORDER: The appeal is dismissed.