U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29064683

Date: DEC. 05, 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 they could not determine that the labor condition application (LCA) the Petitioner submitted corresponded to the petition because the record contained several misstatements and inconsistent representations of facts by the Petitioner. 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 software developer. The petition included a Department of Labor (DOL) LCA certified for a position located within the "Software Developer, Applications" occupational category corresponding to the Petitioner's self-categorization within the Standard Occupational Classification (SOC) Occupational Information Network (O*NET) code 15-1132.00.[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 science or a closely related field.

[1] After the filing of the petition, the Department of Labor's Bureau of Labor Statistics advised that the "Software Developers, Applications" entry at 15-1132.00 was no longer in use and instructed utilizing either the "Software Developers" entry at 15-1252.00 or the "Software Quality Assurance Analyst and Testers" entry at 15-1253.00. The Petitioner's proffered job description aligns with the category entry contained at 15-1252.00 "Software Developers."

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. Specifically, the Director questioned whether the Petitioner was an H-1B dependent employer contrary to what the Form I-129 and LCA reflected. And the Director requested additional evidence to evaluate if the Beneficiary was qualified to undertake the duties of a specialty occupation.

In its RFE response, the Petitioner provided a copy of its payroll summary generated by the retail accounting software program it utilizes, a list of the total number of employees it employed at the time of filing the petition, and its IRS Form 941 for the periods January, February, March and April, May, June of 2022. The Petitioner also submitted an evaluation of the Beneficiary's education and experience purporting to equate the Beneficiary's credentials to a U.S. bachelor's degree in computer science. The Director denied the petition because the numerous misstatements and inconsistent representations of facts by the Petitioner impeded a reliable evaluation of the Petitioner's H-1B dependent status.

II. 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. *See* 20 C.F.R. § 655.734(d)(1)-(6).

A. Legal Framework

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;

(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).

B. Analysis – Non-correspondent LCA

The Director notified the Petitioner of their concerns regarding the Petitioner's self-identification of its H-1B dependency status 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, it 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 petition's filing date and the quarter the Petitioner filed the petition;
- The Petitioner's state quarterly wage reports for all employees and for all state for the two quarters immediately prior to the filing date of the petition; or
- A table containing the names, current immigrant or nonimmigrant status, and USCIS receipt number if applicable for all employees employed by the Petitioner at the time it filed the petition.

As stated above, the Petitioner provided a copy of its payroll summary generated by the retail accounting software program it utilizes, a list of the total number of employees it employed at the time of filing the petition, and its IRS Form 941 for the periods January, February, March and April, May, June of 2022 in their RFE response. But the evidence did not resolve concerns about the Petitioner's H-1B dependent status. Instead, the evidence only contributed to the opaque nature of the Petitioner's representations in this regard. In the period preceding the filing of the petition, USCIS records reflect the Petitioner filed 10 petitions. At the time of filing, the Petitioner represented it employed eight individuals. But in its RFE response, the Petitioner provided a chart listing six individuals. And the Petitioner submitted other evidence that conflicted further with these representations. For example, the IRS Forms 941 for the periods January, February, March and April, May, June of 2022 reflected the Petitioner paid wages to one and two employees respectively. And the payroll summary generated by the retail accounting software program the Petitioner utilized listed three employees who were categorized as "all employees from all locations" from June 1, 2022 to June 30, 2022 and therefore did not relate only to the Petitioner's H-1B employees at the time of filing the petition.

On appeal, the Petitioner submits additional evidence that does not clarify the record successfully. In addition to what it submitted in response to the Director's RFE, the Petitioner submits its IRS Form

941 for the period July, August, and September 2022 and copies of paystubs for various periods in the first six months of 2022 for five out of the six individuals appearing on its list of the total number of employees it employed at the time of filing the petition. But this evidence did not resolve or reconcile any of the inconsistencies present in the record.

Although the evidentiary standard in immigration proceedings is the lowest preponderance of the evidence standard, the burden is on the Petitioner alone to provide material, relevant, and probative evidence to meet that standard. Section 291 of the Act, 8 U.S.C. § 1361. 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 to the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits. Any inconsistencies in the record must be resolved by the Petition by independent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582 (Comm'r 1988).

Essentially, the Petitioner's submissions into the record prior to and at appeal paint a picture of considerable unreliability. So we are unable to credibly determine how many total employees the Petitioner employed as well as how many H-1B employees it employed. And without determining these critical facts, we cannot ascertain the Petitioner correctly identified itself as an employer who is not H-1B dependent. Consequently, we must conclude the LCA the Petitioner submitted as non-correspondent with the petition it filed.

III. 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 and this appeal must be dismissed.

ORDER: The appeal is dismissed.