U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10343928

Date: JULY 21, 2020

Appeal of Vermont Service Center Decision

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

The Petitioner, an information technology consulting company, seeks to employ the Beneficiary temporarily as an "SAP FICO - business systems analyst" under the H-1B nonimmigrant classification for specialty occupations.[1] 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 Vermont Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that: (1) the position's prerequisites were too diverse resulting in the Petitioner not satisfying the definition of a specialty occupation; (2) the record did not establish that the proffered position qualified as a specialty occupation under the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A); and (3) the Petitioner would have an employer-employee relationship with the Beneficiary. The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence.[2] We review the questions in this matter *de novo*.[3] Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL SHORTCOMING

The Director denied the petition based on three independent grounds:

1. The failure of the position requirements to satisfy the definition of a specialty occupation;
2. The Petitioner did not demonstrate eligibility under the regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A); and
3. The Petitioner would not enjoy the requisite employer-employee relationship with the Beneficiary.

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[1] *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b).
[2] Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).
[3] *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).

Each of these individual issues standing alone would serve as an independent basis for a denial. Therefore, the appellant here, must demonstrate that every stated ground for the denial was incorrect. However, the Petitioner only addresses items 2 and 3 listed above without even making a reference to item 1. Therefore, the Petitioner has abandoned its eligibility claims under item 1.[4]

As a result, even if the Petitioner overcame the issues it addresses within the appeal brief (the employer-employee relationship and eligibility under the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)), it still would not demonstrate that the petition should be approved. When an appellant fails to properly challenge one of the independent grounds upon which the Director based their overall determination, the filing party has abandoned any challenge of that ground, and it follows that the Director's adverse determination will be affirmed. It is unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal.[5]

Upon consideration of the entire record, including the evidence submitted and arguments made on appeal, we adopt and affirm the portion of the Director's decision relating to the Petitioner's position requirements not satisfying the specialty occupation definition with the following comments.[6] The Petitioner initially stated the position required "a minimum of a Bachelor's Degree in CS/IT/IS/MIS/MBA, or a directly related field, as well as knowledge of specialized skills including SAP FICO, AIF . . . and ECC 6 SAP . . . ." Within the Director's request for evidence (RFE), she indicated these requirements not only constituted disparate fields of study that without further explanation correlating them to the positions duties did not constitute a degree in a specific specialty or its equivalent, but also that the Petitioner accepted a business administration degree that without further specialization was insufficient to satisfy the definition of a specialty occupation at section 214(i)(1) of the Act. In response, the Petitioner amended the requirements to "a bachelor's degree or higher (or equivalent) in CS/IT/IS/MIS/MBA, or a closely related/equivalent concentration, along with some relevant software development or related experience/certification/knowledge."

We note several important changes to the position requirements in the RFE response. First, the Petitioner amended its language from a "directly related field" to one that was "closely related." Second, it dropped the references to "knowledge of specialized skills" that was "relevant to the project implementation at hand." Third and most importantly, it added specializations to accompany its MBA (or business administration degree) requirement that were notably absent from the initial filing.

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[4] *See Matter of Zhang*, 27 I&N Dec. 569 n.2 (BIA 2019) (finding that an issue not appealed is deemed as abandoned); *Matter of Valdez*, 27 I&N Dec. 496, 496 n.1 (BIA 2018); *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012); *Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007); *Matter of Cervantes*, 22 I&N Dec. 560, 561 n.1 (BIA 1999) *Matter of Edwards,* 20 I&N Dec. 191, 196-97 n.4 (BIA 1990). *See also Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005).

[5] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding it unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal); *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); *Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009) (generally finding that a waived ground of ineligibility may form the sole basis for a dismissed appeal).

[6] *See Matter of P. Singh, Attorney*, 26 I&N Dec. 623 (BIA 2015) (citing *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994)); *see also Chen v. INS*, 87 F.3d 5, 7-8 (1st Cir. 1996) ("[I]f a reviewing tribunal decides that the facts and evaluative judgments prescinding from them have been adequately confronted and correctly resolved by a trial judge or hearing officer, then the tribunal is free simply to adopt those findings" provided the tribunal's order reflects individualized attention to the case).

The Petitioner has not explained why it should be allowed to make such changes to the position's qualifications subsequent to both the petition's filing date and the organization's original eligibility claims.[7] A petitioner must establish eligibility at the time it files the nonimmigrant visa petition.[8] U.S. Citizenship and Immigration Services (USCIS) may not approve a visa petition at a future date after a petitioner or a beneficiary becomes eligible under a new set of facts.[9] A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements.[10]

Even if we did not consider this to be a material change to the petition, the Petitioner failed to rebut the Director's findings surrounding the degree requirements issue on appeal. As noted above, the Petitioner has abandoned this issue within the appeal.[11] Based on the foregoing, we cannot conclude that the proffered position qualifies as a specialty occupation, and we will dismiss the appeal. Because the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding the position's qualification as a specialty occupation under the regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).[12]

Alternatively, if the above issues did not preclude this petition's approval, we would remand the matter to the Director for her to determine whether the Petitioner designated the correct standard occupational classificational (SOC) code on the labor condition application (LCA), and whether the specified Level I prevailing wage rate was correct. First, the Petitioner classified the proffered position under the occupational title "Computer Systems Analysts," corresponding to the SOC code 15-1121 at a Level I wage rate. However, a significant portion of the duties it provided did not fall under the Computer Systems Analysts occupation, but instead better align with the 15-1132 SOC code relating to the Software Developers, Applications occupation. We note that the Software Developers, Applications occupation demands a higher paying wage in the location and timeframe relating to the LCA. Additionally, the Petitioner imposed what it characterized as "specialized skills" relating to finance and other topics that would be considered special skills and would require an increase in the prevailing wage rate above a Level I.

II. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

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[7] *See 2233 Paradise Rd., LLC v. Cissna*, No. 17-CV-01018-APG-VCF, 2018 WL 3312967, at *3 (D. Nev. July 3, 2018) (finding a petitioner's requirements as inconsistent when it changes the degree prerequisites after an RFE).
[8] 8 C.F.R. § 103.2(b)(1), (12).
[9] *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).
[10] *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998).
[11] *See Matter of Zhang*, 27 I&N Dec. 569 n.2.
[12] *Bagamasbad*, 429 U.S. at 25; *L-A-C-*, 26 I&N Dec. at 526 n.7; *M-A-S-*, 24 I&N Dec. 762, 767 n.2. This includes the employer-employee relationship issue in which USCIS recently rescinded associated policy guidance.