U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8659923

Date: JULY 17, 2020

Appeal of California Service Center Decision

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

The Petitioner, an international law firm, seeks to temporarily employ the Beneficiary as a "foreign exchange professional" 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 Director of the California Service Center denied the petition, concluding that the record does not establish that the Beneficiary possesses the appropriate license to practice in the selected occupational category or that the Beneficiary is exempt from such licensure requirements. On appeal, the Petitioner asserts that the Director erred in the decision.

The Petitioner bears the burden of proof to demonstrate eligibility 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 because the Director's decision is insufficient for review.

I. LEGAL FRAMEWORK

The statutory and regulatory framework that we must apply in our consideration of the evidence of the Beneficiary's qualification to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an individual applying for classification as an H-1B nonimmigrant worker must possess:

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

(B) completion of the degree described in paragraph (1)(B) for the occupation, or

(C) (i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that a beneficiary must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In addition, 8 C.F.R. § 214.2(h)(4)(v) states:

(A) General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

(B) Temporary licensure. If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

(C) Duties without licensure.

(1) In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, USCIS shall examine the nature of the duties and the level at which they are performed, as well as evidence provided

by the petitioner as to the identity, physical location, and credentials of the individual(s) who will supervise the alien, and evidence that the petitioner is complying with state requirements. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

(2) An H-1B petition filed on behalf of an alien who does not have a valid state or local license, where a license is otherwise required to fully perform the duties in that occupation, may be approved for a period of up to 1 year if:

(i) The license would otherwise be issued provided the alien was in possession of a valid Social Security number, was authorized for employment in the United States, or met a similar technical requirement; and

(ii) The petitioner demonstrates, through evidence from the state or local licensing authority, that the only obstacle to the issuance of a license to the beneficiary is the lack of a Social Security number, a lack of employment authorization in the United States, or a failure to meet a similar technical requirement that precludes the issuance of the license to an individual who is not yet in H-1B status. The petitioner must demonstrate that the alien is fully qualified to receive the state or local license in all other respects, meaning that all educational, training, experience, and other substantive requirements have been met. The alien must have filed an application for the license in accordance with applicable state and local rules and procedures, provided that state or local rules or procedures do not prohibit the alien from filing the license application without provision of a Social Security number or proof of employment authorization or without meeting a similar technical requirement.

(3) An H-1B petition filed on behalf of an alien who has been previously accorded H-1B classification under paragraph (h)(4)(v)(C)(2) of this section may not be approved unless the petitioner demonstrates that the alien has obtained the required license, is seeking to employ the alien in a position requiring a different license, or the alien will be employed in that occupation in a different location which does not require a state or local license to fully perform the duties of the occupation.

Therefore, to qualify a beneficiary for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that the beneficiary has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education,

specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree, the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following:

> (*1*) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
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> (*2*) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> (*3*) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
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> (*4*) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
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> (*5*) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience . . . .

II. THE PROFFERED POSITION

The Petitioner stated in its H-1B petition that it will deploy the Beneficiary to its New York office. On the labor condition application (LCA)[1] submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category of "Lawyers" corresponding to the Standard Occupational Classification code 23-1011.[2] The Petitioner stated that the Beneficiary will

[1] While DOL certifies the LCA, U.S. Citizenship and Immigration Services (USCIS) determines whether the LCA's content corresponds with 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 . . .").

[2] The *Handbook* may be accessed at https://www.bls.gov. Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Lawyers, https://www.bls.gov/ooh/legal/lawyers.htm?view_full#tab-4 (last visited Jul. 16, 2020). We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. The occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and we regularly review the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. Nevertheless, to satisfy the first criterion, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

be employed as a "foreign exchange professional" on a team specializing in corporate finance for Latin America, a position which requires at least a juris doctorate degree or equivalent.

III. ANALYSIS

Upon review of the record in its totality, we conclude that the Director may wish to closely examine and clarify the Petitioner's stated minimum requirements for the position. Specifically, the Petitioner stated in its initial support letter that the Beneficiary "will not practice law in the [S]tate of New York, but instead will draw on her legal background" to carry out the duties of the position. In response to the Director's request for evidence (RFE), the Petitioner stated that it "does not require a license to practice law for this position, and our Foreign Exchange Professionals are not expected become licensed in the U.S. as they are not practicing law in the U.S." Furthermore, the Petitioner stated that the Beneficiary is "a licensed attorney in Brazil" and that she "will not be advising clients on matters relating to U.S. law and will not be practicing or holding herself out to the public as an attorney-at-law."

These statements suggest that qualifications to enter into the proffered position do not include a law license and that the Petitioner does require the Beneficiary to obtain admission to a state bar in order to perform the duties of the proffered position. Rather, the duties of the position involve consulting, examining, and analyzing issues on corporate investments and financial transactions in relation to Brazilian law. As part of a legal team within the Petitioner's firm, the Beneficiary will "assist [the Petitioner's] U.S.-trained attorneys." The Petitioner states that its duties require leveraging a legal background, legal training, as well as specialized knowledge of law, but that a license to practice law is not required.

The regulations at 8 C.F.R. § 214.2(h)(4)(v) require a license for an individual to *fully perform* the duties of the occupation. Given the Petitioner's statements noted above, the Director may wish to clarify whether the Petitioner requires the Beneficiary to *fully perform* the duties of the occupation as a licensed attorney or whether the position requires specialized knowledge of the law without the necessity of a law license.

On appeal, the Petitioner provides information via an opinion letter offered by [redacted] Professor of Law at [redacted] of Business and another by [redacted] Professor of the Practice at [redacted] Law School. In addition to this, the Petitioner provides additional specific information concerning the licensed attorneys who will directly oversee and supervise the Beneficiary's day-to-day activities.[3]

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*[4] and *Matter of Obaigbena*[5] to determine whether we will consider the evidence

[3] We acknowledge, but do not specifically discuss all evidence submitted on appeal, including the articles concerning New York consolidated laws, Delaware clerkships, as well as information concerning the partners at the Petitioner's firm and an organizational chart.

[4] *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[5] *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

in our decision. In applying the framework of those cases to the matter at hand, we conclude that the RFE provided notice to the Petitioner that an evidentiary deficiency prevented the Director from making a determination on: (1) whether the Beneficiary obtained the license required by the occupation; (2) whether the Beneficiary is exempt from the requirement; and (3) whether the Beneficiary would fully practice the occupation without a license (which would require further information concerning supervision).

The Petitioner had a reasonable opportunity to respond to the deficiency through the RFE process and, in fact, did provide an RFE response. Furthermore, we conclude that had the Petitioner wanted to, it reasonably could have solicited the aforementioned opinion letters prior to the appeal and submitted them within its RFE response. We further conclude that the Petitioner also reasonably could have obtained and provided in its RFE response the appropriate documentation with which to establish eligibility under 8 C.F.R. § 214.2(h)(4)(v). As such, the AAO is not required to consider this additional evidence submitted on appeal. Nevertheless, we conclude that the Director is the more appropriate party to consider the impact of the evidence on eligibility for the benefit sought.

Specifically, the Director may wish to consider whether the opinions offered by [redacted] contradict the Petitioner's stated requirements for the proffered position. [redacted]'s opinion of the requirements of the position suggest that the Beneficiary will be expected to sit for a bar exam and obtain a law license, as well as that the requirements for the position at the time of hiring are different than those which will be required later. To illustrate, [redacted]'s letter states that candidates for the proffered position are hired with the expectation and understanding that they will eventually gain admission to a U.S. state bar within a reasonable period after commencement of employment. His letter is replete with statements that indicate the qualifications at the time of hiring do not require a law license, but that such qualifications will change at a future time in order for the candidate to "advance" or "ascend" to the role of a fully licensed attorney. It appears that [redacted] considers the proffered position to initially be separate and distinct from that of a licensed attorney, but that it is the intent of the Petitioner that at some point after the hiring phase, the proffered position will change once the Beneficiary passes a bar examination and becomes a U.S.-licensed attorney.[6]

The Petitioner and [redacted] both seem to agree that in order to compete for new talent, it is industry practice for top tier firms to extend offers to law students prior to their attainment of a juris doctorate degree or LLM degree, as well as that recent law graduates may be hired prior to admission to the bar. While this may be true, the Director may wish to explore whether this industry practice is applicable in this particular case. The record reflects that after five years of study in Brazil, the

[6] 8 C.F.R. § 103.2(b)(1) requires that a petitioner establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. Therefore, a visa petition may not be approved at a future date after the Petitioner or the Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed. In order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended or new petition, along with a new LCA certified by DOL, in order to capture any material changes in terms or conditions of employment or the beneficiary's eligibility.

Beneficiary graduated with a degree entitled "Bachelor of Laws"[7] and that she also graduated with a U.S. master of law degree in June 2017. This petition was filed in April 2019 with a requested employment period of October 2019 to August 2022. As such, the two-year gap between the Beneficiary's graduation and the filing of the petition may suggest that at the time of such filing, the Beneficiary was not a recent graduate in the manner in which the claimed industry practices are conducted.

To support the argument that the Beneficiary may work as lawyer in the proffered position without a license, [redacted] references a New York state law provision which he contends expressly contemplates that law graduates may be employed as non-attorney legal professionals prior to admission to the bar.[8]

The citation states that among the various requirements for being admitted to the New York state bar, a candidate must possess the "skills and values necessary to provide effective, ethical and responsible legal services." One way of meeting this particular requirement is through a six-month apprenticeship whereby an unlicensed law graduate or LLM student may perform legal research, writing, and related legal work under the supervision of a licensed attorney. [redacted] uses this provision to suggest that because New York law permits this type of work pursuant to an apprenticeship that the Beneficiary's work in the proffered position without a license is therefore not contraindicated.

The Director may wish to explore the applicability of this state law provision in the matter at hand. The provision is intended to codify the various ways that a person may meet one of several requirements to be admitted to the New York bar; its purpose is not to offer an employment loophole or a grace period for licensure requirements. In light of this information, we again draw the Director's attention to the above-stated industry practice concerning recent graduates and law students in the process of completing their studies, as well as the petition filing date, and the requested employment period.

IV. CONCLUSION

The matter will be remanded to the Director to clarify: (1) the Petitioner's minimum requirements for the position; (2) whether the Beneficiary will be expected to fully perform the duties of a lawyer such that a license is required; and (3) if a license is required, whether the Petitioner has established the Beneficiary's eligibility under any of the 8 C.F.R. § 214.2(h)(4)(v) provisions.

The Director may request any additional evidence considered pertinent to the new determination and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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[7] The Director may also wish to request a credential equivalency evaluation for this foreign degree. The record contains a translation of the Beneficiary's transcript, but the U.S. academic equivalency of the Beneficiary's foreign degree has not been established.

[8] [redacted] cites 22 NYCRR § 520.18, which can be accessed at http://www.nycourts.gov/ctapps/520rules10.htm (last visited Jul. 16, 2020)

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