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COURT SHOOTS DOWN EMBARRASSING LEAPS BY USCIS TO JUSTIFY AN H-1B DENIAL

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Ever got that frustrating feeling that the USCIS adjudicator first decided that the H-1B petition needed to be denied and only then set about finding reasons, however shaky, to support that denial? Ever wondered how it is possible for the adjudicator to completely ignore the preponderance of the evidence standard in favor of the criminal standard of beyond all reasonable doubt? The case of *Innova Solutions, Inc. v. Kathy A. Baran*, case number 2:18-cv-09732 in the US District Court for the Central District of California evokes these exact types of feelings and questions.

As background, except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought. *See e.g. Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997) (noting that the petitioner must prove eligibility by a preponderance of evidence in visa petition proceedings) . . .

> The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "ruth is to be determined not by the quantity of evidence alone but by its quality." *Id*. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. Even if the director has some doubt as to

> the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring).

Matter of Chawathe, A74 254 994 (Admin. Appeals Ofc. / USCIS Adopted Decision, Jan. 11, 2006).

Under the preponderance of the evidence standard, the adjudicating USCIS officer is supposed to approve the petition as long as it is "more likely than not" that the petitioner's claim is true. Cases like *Innova* demonstrate that this standard is surely not being applied, at least not across the board.

Innova sought to employ the foreign national beneficiary as a Solutions Architect to work in-house at their corporate headquarters developing their proprietary software and hardware. USCIS issued what has become a typical RFE requesting additional information to establish the specialty occupation nature of the position; the beneficiary's qualifications; and that an employer-employee relationship existed. Innova's RFE response included a cover letter explaining the type of the work in which the beneficiary would be engaged; a description of the beneficiary's typical day by percentage; an organizational chart; a Proof of Concept for the project the beneficiary would be involved with; Innova's tax returns; Innova's lease for the area where the Beneficiary would work; and an overview of Innova. Still, USCIS denied the petition on the grounds that the employer-employee relationship had not been established and Innova had failed to demonstrate that the beneficiary would be working in-house and not placed with an end-client and failed to show sufficient in-house employment for the duration of the requested H-1B period.

Innova filed suit thereby allowing us to see that no argument is too weak for USCIS to rely upon.

Despite Innova's clear statements in its initial petition and RFE response, USCIS argued that it was rendered incapable of determining whether the beneficiary would be working on Innova's product or whether he would be working at a third party client site all because Innova's website indicated that Innova's main function is to provide information technology consulting services to other companies. But the court pointed out that this same website indicated that

Innova provided “services” and “solutions” to its clients. Under the “solutions” portion of the website was information about software programs and applications created by Innova. The court stated that “because USCIS visited Innova’s website and relied on the website as evidence in making its findings, USCIS may not then ignore evidence on the website contradicting its position.”

Another reason for USCIS’ denial was that Innova failed to provide sufficient evidence to establish that it created its own products in-house. To justify its reasoning, USCIS pointed out that the Proof of Concept PowerPoint that Innova submitted with its RFE response merely established that the product exists and not that Innova is the company producing it or that the beneficiary would work on it. USCIS dismissed information on the project because all information about it “was submitted by petitioner or petitioner’s counsel in counsel’s cover letter”, i.e. there was no published or printed information. USCIS even went as far as to claim that despite Innova’s submission of a copy of its lease for a 450ft space, it remained unknown whether this is sufficient space to produce the information technology project or whether the space is being used to develop and produce the claimed product. USCIS also claimed that Innova’s tax returns were not sufficient to establish that the company produced a product that it sold within those tax years.

Thank goodness for the existence of rational judges. The court held that it was illogical for USCIS to dismiss Innova’s PowerPoint in its entirety just because there was an absence of printed work published about the product. The product is nonexistent and Innova consistently stated that the beneficiary was needed to produce the product. Regarding USCIS’ purported lack of knowledge as to whether the corporate headquarters would be able accommodate the work on the project, the court pointed out that it was entirely clear that the beneficiary would only require a desk and a computer! And, as for the tax returns, the court reminded USCIS that these were only submitted to prove that the company had sufficient work available for the beneficiary and not to prove it sold goods. Further, the product on which the beneficiary would work was intended to be used in-house to provide solutions to Innova’s clients and there was no stated intention to sell it.

Overall, USCIS claimed that it had to deny the case due to “numerous inaccuracies and contradictions.” Thankfully, the court did not find these to be plausible. The court shot down USCIS’ claim that there was an inaccuracy in Innova’s statement that it had 177 employees because the organizational chart

it submitted showed only 7 people. The court pointed out that Innova never claimed that the chart listed every single employee. It was actually submitted to show that the beneficiary would report to the Vice President of the company. USCIS also isolated one job duty that indicated the beneficiary would "clarify the ambiguities and issues with the business stakeholders and help the team in proper execution of the project" and used this to state that it appeared he may be working with clients. The court found that there was no evidence that he would not be doing this in-house as the company stated.

And, in its biggest leap, USCIS took Innova old job advertisements, submitted to prove that Innova typically required a Bachelor's degree for the offered position, wherein Innova had stated a requirement for travel to client sites, and used these to support its argument that the beneficiary would be traveling to client sites. The court had to point out that a showing relevant to the specialty occupation argument did not demonstrate that the beneficiary would also be required to travel.

The jumps and leaps that USCIS made to deny this case truly indicate a complete disregard for the preponderance of the evidence standard. Rather than adhering to the rule of law, USCIS is blatantly more concerned with its agenda to maintain its steady attack on the H-1B visa category. With all the evidence submitted by Innova, it was unquestionably "more likely than not" that its claims were true. While the court didn't go as far as to state this, it appears that USCIS applied the "beyond all reasonable doubt" standard, the highest standard of proof possible. Thankfully, they were not allowed to get away with it in this instance. Hopefully, more and more employers are finding the courage to fight back and illuminate for the rest of us, how far USCIS will sometimes go and to provide us with case law that can be cited to prevent future, similar casualties, especially for employers who simply cannot finance a federal law suit. Plucky Innova deserved to win this one even though it has lost previously in other H-1B matters. RFE responses should remind USCIS that it needs to consider the record as a whole; that USCIS cannot isolate specific statements to try to justify its claims; and that there must be a rational connection between any stated reasons for denial and the actual facts of the case. And, as if H-1B petitions haven't gotten hard enough, it may behoove us to sit with each piece of evidence and try to imagine how it could possibly be misinterpreted or reimagined to justify a denial. Although, try as we might, some things are just unimaginable.