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THE GOVERNMENT'S "NASTY" TREATMENT OF EXPERT OPINIONS IN SUPPORT OF H-1B VISA PETITIONS

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USCIS' current ferocious attack on H-1B petitions has been discussed here, here and here. Backed by the Trump administration, USCIS has openly declared war on H-1Bs. What is most frustrating, in my opinion, is not only the fact that there appears to be a concerted effort to find some way to reject each and every logical, rational, legal argument presented in response to one of the USCIS' Requests for Evidence (RFE) but that it appears that no argument is too baseless for USCIS to present when issuing a denial of an H-1B petition. Case in point is USCIS' rejections of expert opinions presented to bolster an employer's argument that an H-1B position is classifiable as a specialty occupation.

As a reminder, in order to hire a foreign worker in a specialty occupation under the H-1B category, the employer must show in its petition that the proffered position meets at least one of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 CFR 214.2(h)(4)(iii)(A)

After USCIS issued its first wave of attack on H-1B petitions filed and selected under the FY 2018 H-1B visa lottery claiming that any position where the H-1B worker would be paid an entry-level (Level 1) wage did not appear to be a specialty occupation, previously blogged about here, this groundless claim was met with mass pushback. Without a legal leg to stand on, USCIS has largely circumvented the issue of the wage levels (although still denying some petitions on that basis) by finding ways to deny the H-1B petition on a claim that the proffered H-1B position simply fails to qualify under any of the specialty occupation prongs listed in 8 CFR 214.2(h)(4)(iii)(A). In doing so, USCIS has been rejecting expert opinion letters written by qualified experts expounding on how and why the proffered position qualifies as a specialty occupation. The arguments presented in USCIS' rejection of these expert opinions are quite maddening.

In an effort to demonstrate that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position under prongs 1, 2 and/or 4 of 8 CFR 214.2(h)(4)(iii)(A), H-1B employers quite frequently solicit the opinion of an expert. This expert is usually a college professor with a rich background in the specific specialty area, who is well-experienced in reviewing and evaluating academic and experience qualifications; and who has had an opportunity to observe and compare the abilities of numerous talented students in the specialty fields, and to analyze the ways in which the educational backgrounds of these students have been applied in the professional industry. Typically, this expert has also offered opinions and analyses of the academic and professional credentials of candidates in connection with university admissions and employment positions. The expert is usually also someone who has been engaged in the preparation of equivalency evaluations and position evaluations, primarily for use with connection to immigration-related procedures, for many years, and has prepared hundreds, sometimes over 1,000 such evaluations. Accordingly, the expert is typically someone well positioned to opine on whether or not a proffered position, in his/her particular specialty field, is a specialty occupation. Pre-Trump, USCIS gave such expert opinions the respect they deserved.

However, USCIS now seeks to discredit these opinions and what's most frustrating are the rejections reasons presented. Here are a few that this author has had the opportunity to review:

- The professor did not base his opinion on any objective evidence but instead restated the proffered position as provided by the employer;
- The professor's opinion is not supported by citations of research material;
- The professor did not rely on a specific study of the employer's organization. There is no evidence that the professor knew more about the proffered position than what the employer provided. There is no indication that the professor visited the employer's business, observed its employees, interviewed them about the nature of their work, or documented the knowledge that they apply to their jobs.
- The professor's opinion does not relate the professor's conclusions to specific, concrete aspects of the employer's business operations so as to demonstrate a sound factual basis for the professor's conclusions about the educational requirements for the proffered position.
- Given the professor's limited review of the duties of the position, based largely on the job descriptions furnished by you, USCIS gives less weight to the professor's opinion.
- It was held in *Matter of Caron International, Inc.* 19 I&N Dec. 791 (Comm 1988) that legacy INS, now USCIS, may in its discretion use advisory opinion statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. However, where an opinion is not in accord with other information, or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence.

With some of the reasons for rejection of an expert opinion, USCIS doesn't make it clear whether they're expressing doubt as to whether the duties of the proffered position will actually be performed as stated, i.e. whether they think the expert is relying on facts they find not credible, or whether they're challenging the professor's overall credibility as an expert. In any event, whatever standard is presently being used to reject the expert opinions, it is not the preponderance of the evidence standard.

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 their claim is true. USCIS' recent denials rejecting expert opinions show that this standard is surely not being applied. As an expert, a professor may review the job duties of the proffered position and formulate his opinion based on his expert knowledge of the specialty field, which knowledge would have been explained at length in his opinion letter. The expert need not conduct a specific study of an employer's organization. He need not visit an employer's business or observe its employees. His expertise is typically set forth in his opinion letter and he need not provide the USCIS with copies or citations of research material.

Under the Federal Rules of Evidence, which are not binding on H-1B adjudications but may be a useful analogy, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Federal Rules of Evidence (FRE) Rule 702, https://www.law.cornell.edu/rules/fre/rule_702. Moreover, an expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect. FRE Rule 703 https://www.law.cornell.edu/rules/fre/rule_703. Thus, even under the Federal Rules of Evidence, first-hand knowledge is not necessarily required even if the expert were testifying in federal court! An expert can legitimately have an opinion about "facts or data in the case that the expert has been made aware of", (such as the job duties of a proffered H-1B petition) not merely those which he has "personally observed". Immigration proceedings don't follow the Federal Rules of Evidence, but rather the rules of evidence ought to be more relaxed, not stricter!

So why is USCIS suddenly stretching to find fault with these expert opinions? The USCIS may disregard the expert opinion, but it may only reject such an opinion if it is not in accord with other information in the record or is otherwise questionable. In *Matter of Skirball Cultural Center*, the Administrative Appeals Office (AAO) held that uncontroverted testimony of an expert is reliable, relevant, and probative as to the specific facts in issue. In that case, the AAO specifically pointed out that the director did not question the credentials of the experts, take issue with their knowledge or otherwise find reason to doubt the veracity of their testimony. But when it comes to the denials of H-1B petitions, it is all too easy to claim doubt, to take issue with the expert's knowledge and to coolly dismiss the expert opinion.

So are expert opinions still worth it? I would argue that they are. First, H-1B adjudications are still haphazard. There is always a *chance* that the opinion may be accepted. With the submission of any expert opinion it might be beneficial

to include an argument on why the opinion ought to be accepted reminding USCIS of the applicable standard. While in most cases it may not benefit the H-1B employer or beneficiary in the short run, H-1B practitioners must continue to fight back. We cannot go gentle into that good night. A rejection of the expert opinion would lead to a conclusion that USCIS is setting a standard for expert opinions that is even higher than the Federal Rules of Evidence and that would contravene the applicable preponderance of the evidence standard. These denials need to be appealed to the AAO. If the AAO denies, the denial can also be challenged in federal court. In *Fred 26 Importers, Inc. v. DHS,* 445 F.Supp.2d 1174, 1180-81 (C.D. Cal. 2006) the federal court reversed the Administrative Appeals Office (AAO) where it failed to address expert affidavits and other evidence that a human resource manager position was sufficiently complex and rejected the H-1B because it was a small company. The court held that the AAO abused its discretion when it did not take into account the expert opinion evidence presented by the petitioner to prove that the position required a broad range of skills acquired through a four-year university degree. It is only through continued pushback that these erroneous denials will come to an end.