Building a Record for Litigation: "Full Effort is Full Victory"

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"Full Effort is Full Victory"

- Mahatma Gandhi
- Full quote is: "Satisfaction lies in the effort, not in the attainment. Full effort is full victory."
- In our case, satisfaction lies in winning.
- Putting a full effort into a petition at the time of filing can lead to full victory, particularly in litigation, which is extremely satisfying.

Why is the Record Important?

- Court decides if USCIS' decision is supported by the law as applied to the facts in evidence as established by the petition and supporting documentation submitted to USCIS.
- You CANNOT supplement the record during federal court litigation. Therefore you need to look ahead to possible litigation when compiling evidence/documentation for the initial petition.

Basic Principles

- Facts must come from petitioning employer.
- Attorney statements are NOT evidence.
- Attorney presentation should be limited to explaining legal requirements; applying law to facts.
- Don't be afraid to use "fighting words" in your cover letter – let USCIS know that you know what the law is, and isn't.

Identifying and Addressing Issues That May Lead to a Denial

- "Targeted" specialty occupations: finance occupations, logisticians, market research positions, business analysts, operations research analysts
- Dealing with USCIS's new de facto "exclusive degree" rule for specialty occupations
- USCIS position that degree "normal" for the occupation means degree ALWAYS required.
- The limitations of O*Net and the OOH

Strategies and Tactics

- Provide robust context and detailed, yet fully comprehensible, job duties. Go beyond standard employer job descriptions
- Explore functional descriptive titles if internal titles are vague
- Consult and interview direct manager; separate letter may be useful in initial petition or RFE response
- Charts showing relationship between duties and courses taken for degree

Preparing the RFE or NOID Response with the Record for Future Litigation in Mind

- Under the new memorandum on RFE's and NOID's issued on July 13, 2018 (PM-602-0163, aila infonet doc.# 1807137) adjudicators have the discretion to deny cases without an RFE or NOID if they feel that the evidence in the record does not establish eligibility. This may impact practitioners' strategies in terms of what documentation to present upon initial filing.
- The long-standing prior standard provided that USCIS would NOT issue an RFE or NOID, and would deny outright, ONLY if there was "no possibility" that the deficiency could be cured or if the person was legally ineligible for the benefit sought.
- In combination with the proposed (but not yet implemented) NTA memo, this may be an expedited process to remove someone, disguised as a decision on the sufficiency of evidence.

What is the "Preponderance of the Evidence" Standard and How Does it Work (Or Not . . .)?

- USCIS is doing its utmost to undermine the appropriate standard of adjudication by ignoring it; enacting policies to diminish it such as the new denial without RFE policy.
- A petitioner must show by a preponderance of the evidence that the petition meets each eligibility requirement for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).
- *U.S. v Cardozo-Fonseca*, 480 U.S. 421 (1987) defines "more likely than not" as a greater than 50% probability of something occurring. This is a LOWER standard than "clear and convincing" or "beyond a reasonable doubt."

What is the "Preponderance of the Evidence" Standard and how does it work (or not . . .)? (cont.)

- Under current USCIS policy, as stated by Director Bill Yates in 2006, "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. In other words, even if an officer has some doubt about the claim, the petitioner satisfies this standard of proof if it submits evidence that when considered "individually and within the context of the totality of the evidence" shows that the claim is probably true.

What is the "Preponderance of the Evidence" Standard and how does it work (or not . . .)? (cont.)

- USCIS is not entitled to ignore or dismiss probative, credible evidence that addresses eligibility standards without some sort of reasonable basis or countervailing evidence.
- Uncontested facts must be accepted by USCIS unless there is valid reason to find otherwise. *See Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985, 996 (S.D. Ohio 2012).

Using Expert Opinions to Maximum Effect

- USCIS will not have experts or expert opinions.
- *Matter of Skirball Cultural Center,* 25 I&N Dec. 799 (AAO 2012)(unchallenged credentials of an expert witness's "uncontroverted testimony" must be treated as "reliable, relevant, and probative as to the specific facts in issue").

Using Expert Opinions to Maximum Effect (cont.)

- Ensure the expert opinion you obtain is not from a source that USCIS might dismiss as "self-serving."
- Have the expert review and discuss the specific job duties of the position and speak to HR or the beneficiary's manager.
- Try to use more than one expert source.
- Understand and anticipate the ways in which USCIS may try to dismiss or discredit the expert's statement or testimony (e.g., the expert did not verify the facts provided by the employer; the expert did not does not assert in-depth knowledge of the petitioner's business operations.) Be prepared to make a legal argument as to the role of an expert in these cases.

Sourcing Other External Evidence

- Letters from other similar employers requiring a similar educational background for the same position may be more difficult to refute than job listings from other employers.
- Independent academics, industry experts, trade associations and authoritative written sources may all be helpful.

The Weight of Petitioner Statements

- USCIS likes to pretend that petitioner statements do not carry any evidentiary weight, but that is not exactly the case.
- What better source of evidence than the employer for job duties, details related to the complexity of the position, others in the company with similar backgrounds? What other source can there be for this information?
- Petitioner statements regarding others employed in similar occupations with similar backgrounds should be supported with other credible evidence of the petitioner's employment of those individuals in those positions.
- Number of previously approved petitions for the same petitioner, same position, same educational background. Not undermined by the demise of the deference policy and could be helpful in litigation.

The Weight of Petitioner Statements (cont.)

- *Matter of Treasure Craft*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972) is often cited to support wholesale rejection of petitioner statements. What the decision actually says (at 194):
  - The petitioner's statement must be given due consideration; however, this Service is not precluded from rejecting such statement when it is contradicted by other evidence in the record of the matter under consideration.

Questions?
Comments?