U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-A-, INC.

DATE: APR. 11, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a school for children with special needs, seeks to employ the Beneficiary as director of sports activities. It requests his classification under the third-preference, immigrant category as a professional. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. employer to sponsor a foreign national with a bachelor's degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition. The Director concluded that, contrary to the requirements of the offered position and the requested classification, the Petitioner did not establish the Beneficiary's possession of a U.S. bachelor's degree or a foreign equivalent degree. On appeal, we affirmed the decision. *See Matter of G-A-, Inc.*, ID# 745127 (AAO Oct. 27, 2017).

The matter is now before us on the Petitioner's motion to reconsider. The Petitioner asserts that we erred in rejecting its "amended" petition, which seeks to classify the Beneficiary not as a professional, but as a skilled worker. *See* Section 203(b)(3)(A)(i) of the Act (allocating visas for qualified immigrants with at least two years of training or experience).

Upon review, we will deny the motion.

I. MOTION TO RECONSIDER

A motion to reconsider must establish that, based on the record at that time, our decision misapplied law or policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. THE AMENDED PETITION

The Petitioner asserts that case law does not support our rejection of its amended petition. In declining to consider the Beneficiary's classification as a skilled worker, we cited *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r 1998), an immigrant investor case holding that a petitioner may

not materially change a petition after its filing in an effort to overcome deficiencies. *See* section 203(b)(5)(A) of the Act (allocating visas for qualified immigrants who seek to engage in new commercial enterprises in the United States). The Petitioner, however, notes that, in *Izummi*, we barred revisions to an investment plan because the changes stemmed from agreements entered into, and guidance issued, after the petition's filing. *Id.* at 175. Unlike in *Izummi*, the Petitioner argues that consideration of the Beneficiary as a skilled worker would not change existing facts, including the job requirements of the offered position and the Beneficiary's qualifications.

Izummi based its holding on the rule that a petitioner must establish its eligibility as of a petition's filing. *Id.* at 175-76 (citations omitted); *see also* 8 C.F.R. § 103.2(b)(1) (requiring a petitioner to establish eligibility as of the filing of a benefit request). As the Petitioner argues, our consideration of the Beneficiary as a skilled worker would not revise evidence of record. But the criteria for the petition's adjudication would materially change. The change also would be an attempt to overcome deficiencies in the original petition, which requested professional classification. Thus, we find that *Izummi* supports our rejection of the Petitioner's amended petition. Moreover, the Petitioner does not cite any case law endorsing an acceptance of its amendment to consider the Beneficiary as a skilled worker.

The Petitioner also asserts that USCIS policy supports consideration of the amended classification. The Petitioner cites online information stating that, after a petition decision, the Agency bars a petitioner from changing a requested visa category. The Petitioner notes that it requested a new classification before the Director's decision, in response to his request for evidence.

The online USCIS information states:

> When we accept your Form I-140 for processing, we create an electronic record and mail a Form I-797, Receipt Notice, to you and the representative on the Form G-28. The receipt notice will indicate the visa category that you requested on Part 2 of the Form I-140. Make sure this category is correct. If it is not correct (for example, if you or USCIS has made a clerical error), immediately call the USCIS Contact Center at 800-375-5283 or 800-767-1833 (TTY) to request that we change the visa classification before making a decision on your form.
>
> Although you may request that we change the visa classification to correct a clerical error in Part 2 of the form, we will make the final determination about whether to change the visa classification based on everything in your case.

USCIS, "Petition Filing and Processing Procedures for Form I-140," https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker (last visited Mar. 29, 2018).

Thus, a petitioner may request a classification change before a decision is issued in order to correct a clerical error. Here, the Petitioner does not demonstrate, or even assert, that its initial request for the

Beneficiary's classification as a professional was inadvertent. Rather, in response to the Director's request for evidence, which identified the Beneficiary's ineligibility for professional classification, the Petitioner stated:

> You explain that for the purpose of USCIS classification 203(b)(3)(A)(ii) professional, the education requirement can only be established by a degree from an accredited institution of higher education. You would, however, be able to qualify him as a skilled worker under 203(b)(3)(A)(i). Since the Department of Labor found the applicant qualified, the issue is with the USCIS classification. We, therefore, are enclosing an amended I-140 requesting the approval of the I-140 under the skilled worker category. We trust this should resolve your objection.

It is clear from the Petitioner's statement that the initial request for classification as a professional was not a clerical error or otherwise inadvertent. Our rejection of the Petitioner's amended petition therefore does not violate USCIS policy.

Finally, the Petitioner asserts that "[i]f the [visa] category is changed, the issue is resolved in the beneficiary's favor." As indicated in our appellate decision, however, a beneficiary must not only qualify for a requested classification, but he or she must also meet the job requirements of an offered position as stated on an accompanying labor certification. Here, we could not approve an amended petition for the Beneficiary as a skilled worker because he does not meet the job requirements of the accompanying certification. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977) (requiring a petitioner to establish a beneficiary's possession of all Department of Labor (DOL)-certified job requirements).

In evaluating a beneficiary's qualifications, USCIS must examine the job offer portion of a labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification application asked the Petitioner to state the minimum educational level required for the offered position. Rather than indicating "None," "High School," or "Other," the Petitioner selected "Bachelor's" degree. Asked if there is an acceptable, alternate combination of education and experience, the Petitioner indicated "No." Therefore, the plain language of the job offer portion of the certification states that the position requires at least a bachelor's degree. It does not allow a potential applicant to qualify with work experience alone. *See, e.g., SnapNames.Com, Inc. v. Chertoff*, No. CV-06-65-MO, 2006 WL 3491005, *7 (D. Or. Nov. 30, 2006) (holding that "where the plain language of [the labor certification] requirements does not support the petitioner's asserted intent, the agency does not err in applying the requirements as written").

As the Petitioner concedes, the Beneficiary lacks a U.S. bachelor's degree or a foreign equivalent degree. Rather, the Petitioner asserts his possession of a baccalaureate equivalency based entirely on

employment experience. The record therefore does not establish his qualifications for the offered position. Thus, although the Beneficiary's credentials qualify for skilled-worker classification, we would deny an amended petition requesting that category because he does not meet the job requirements of the accompanying labor certification.[1]

For the foregoing reasons, the record does not establish our misapplication of law or policy in rejecting the Petitioner's amended petition. We will therefore affirm our appellate decision.

III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed on appeal, the record also does not establish the Petitioner's ability to pay the proffered wage.

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence.[2] 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of director of sports activities as $29,806 a year. Contrary to 8 C.F.R. § 204.5(g)(2), however, the Petitioner did not submit required evidence of its ability to pay the proffered wage. The Petitioner submitted copies of the personal, income tax returns of its owner/president for 2015, the year of the petition's priority date. But these returns do not reflect the finances of the petitioning corporation. As a corporation, the Petitioner constitutes a separate, legal entity from its owner/president. *See, e.g., Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530, 531 (Comm'r 1980) (citation omitted) (explaining that a corporation is a distinct, legal entity from its shareholders).

The Petitioner asserted that IRS Form Schedule C, Profit or Loss From Business, part of the tax returns of its owner/president, includes the company's finances for 2015. Schedule C, however, states financial information about a limited liability company (LLC) with a different federal employer identification number than the petitioning corporation. *See also* N.Y. Dep't of State, Div. of Corps., State Records & UCC, https://www.dos.ny.gov/corps/bus_entity_search.html (last visited Mar. 30, 2018) (listing the Petitioner and the LLC as separate entities). Thus, Schedule C does not reflect the Petitioner's finances for 2015. The record therefore lacks required evidence of the

[1] The Petitioner notes that another section of the labor certification indicates the Beneficiary's lack of a bachelor's degree and contends that in certifying the labor certification, DOL found the Beneficiary qualified for the position. However, it is DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is USCIS' responsibility to determine if the Beneficiary qualifies for the offered position, and whether the offered position and the Beneficiary are eligible for the requested employment-based immigrant visa classification. *See, e.g., Madany*, 696 F.2d at 1015. *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984).

[2] This petition's priority date is April 28, 2015, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

Petitioner's ability to pay. *See Sitar Rest. v. Ashcroft*, No. Civ.A02-30197-MAP, 2003 WL 22203713 *2 (D. Mass. Sept. 18, 2003) (holding that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage").

In any future filings in this matter, to establish its ability to pay the proffered wage, the petitioning corporation must submit copies of its annual reports, federal income tax returns, or audited financial statements for 2015, 2016, and, if available, 2017.

IV. CONCLUSION

The Petitioner's motion to reconsider does not establish that our rejection of its amended petition misapplied law or policy. The motion also lacks support from a pertinent precedent or adopted decision, statutory or regulatory provision, or agency policy statement and does not establish eligibility for the benefit sought.

ORDER: The motion to reconsider is denied.

Cite as *Matter of G-A-, Inc.*, ID# 1208273 (AAO Apr. 11, 2018)