U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 35405239

Date: APR. 29, 2025

Appeal of Service Center Operations (SCOPS) Decision

Form I-140, Immigrant Petition for Alien Workers (Other Worker)

The Petitioner, a nursing home, seeks to permanently employ the Beneficiary as a caregiver. The company requests her classification under the employment-based, third-preference (EB-3) immigrant visa category as an "other worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). Businesses may sponsor noncitizens for U.S. permanent residence in this category to work in jobs requiring less than two years' training or experience. *See* 8 C.F.R. § 204.5(l)(2) (defining the term "other worker").

Service Center Operations (SCOPS) denied the petition. SCOPS concluded that the Petitioner did not demonstrate the Beneficiary's qualifying education for the offered job. On appeal, the company contends that its accompanying certification from the U.S. Department of Labor (DOL) unintentionally excludes a foreign high school diploma as an acceptable credential for the job. The company asserts that SCOPS abused its discretion by not excusing the clerical error.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the company has not established its claimed intent to accept a foreign high school diploma for the offered job. We will therefore dismiss the appeal.

I. LAW

Immigration as an other worker, or "unskilled" worker, generally follows a three-step process. First, a prospective employer must apply to DOL for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). USCIS determines, among other things, whether a noncitizen beneficiary meets the

requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D).

Finally, if USCIS approves a petition, a beneficiary may apply for an immigrant visa abroad or, if eligible, "adjustment of status" in the United States. *See* section 245(a)(1) of the Act, 8 U.S.C. § 1255(a)(1).

II. ANALYSIS

A petitioner must demonstrate that, by a petition's priority date, a beneficiary met all DOL-certified job requirements on an accompanying labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is July 1, 2022, the date DOL accepted the Petitioner's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

When assessing a beneficiary's qualifications, USCIS must examine an accompanying labor certification to determine the offered job's minimum requirements. The Agency may neither ignore a certification term nor impose unstated requirements. *E.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the burden of setting the *content* of the labor certification") (emphasis in original).

The Petitioner's labor certification lists the minimum requirements of the offered caregiver job as a U.S. high school diploma and three months' experience in the job. Question H.9 of the labor certification application asked the company: "Is a foreign educational equivalent acceptable?" In response, rather than checking the box marked "Yes," the Petitioner checked the box marked "No."

The petition lacks evidence that the Beneficiary has a U.S. high school diploma. Rather, the filing includes copies of a Philippine high school diploma and secondary school record in her name. The Petitioner also submitted an independent, professional evaluation equating her foreign educational credential to a U.S. high school diploma.

SCOPS' notice of intent to deny (NOID) the petition acknowledges that the evaluation found the Beneficiary's Philippine diploma equivalent to a U.S. high school diploma. But the NOID notes that the company's response to question H.9 on the labor certification application excludes a foreign high school equivalency as an acceptable educational credential for the offered job.

The Petitioner's NOID response included a sworn declaration from the company's administrator/owner. She stated that the Petitioner intended to accept applicants with either U.S. or foreign high school diplomas for the offered job but that, in response to question H.9 on the labor certification application, the company inadvertently checked the wrong box. She stated that advertisements for the job do not limit qualified applicants to U.S. high school graduates. Rather, she said that the ads also allow acceptance of "those who receive high school diplomas from abroad."

Citing case law, SCOPS found that the Petitioner could not alter its response to question H.9 on the labor certification. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998) (ruling that "a petitioner may not make material changes to a petition that has already been filed in an effort to make

an apparently deficient petition conform to Service requirements.") Because the company did not submit evidence that the Beneficiary has a U.S. high school diploma as the labor certification specifies, SCOPS found her unqualified for the offered job.

On appeal, the Petitioner reiterates that it mistakenly checked the "No" box in response to question H.9 on the labor certification application. The company contends that "USCIS abused its discretion by depriving a care home for the elderly of a qualified caregiver solely because of the Petitioner's harmless clerical error on [the application]."

In determining the offered job's requirements, SCOPS should have considered the labor certification as a whole. *See Matter of Credent Techs. LLC*, 2014-PER-00065, *7 (BALCA Feb. 27, 2018) (reading a labor certification application form in its entirety to determine that an employer misinterpreted question H.10 as applying to the offered job's alternate requirements). The Petitioner's response to question H.9 of the labor certification indicates that the company will not accept a foreign high school diploma to meet the job's educational requirement. But in section J. of the certification, "Alien Information," the Beneficiary – whom the company selected to fill the offered job – attested to her receipt of a foreign high school diploma. Thus, the labor certification indicated that the response to question H.9 may have mistakenly indicated the job's requirement of a U.S. high school diploma. Based on the labor certification's internal contradictions, SCOPS should have considered additional evidence, including the Petitioner's recruitment materials for the offered job during the labor certification process to resolve the ambiguity created.

Copies of the advertisements and other recruitment materials for the offered job variously state its minimum educational requirement as a "High School Diploma," "H.S. Diploma," or a "High School Diploma or Equivalent." As the Petitioner argues, the recruitment materials do not specifically exclude holders of foreign high school diplomas. But neither do they specifically accept them. Thus, a preponderance of the evidence does not demonstrate the company's intent to accept foreign high school diplomas to meet the offered job's educational requirement.

The Petitioner describes its response to question H.9 on the labor certification as a "harmless" error. *See, e.g., Zamorano v. Garland*, 2 F.4th 1213, 1228 (9th Cir. 2021) (applying "traditional administrative law principles," including the harmless error rule, when reviewing an agency's decision). But the Petitioner's claimed error alters the petition's outcome. The company's acceptance or non-acceptance of a foreign high school diploma determines the Beneficiary's qualifications for the offered job. The error is therefore not harmless.

Also, citing a former precedent Board of Alien Labor Certification Appeals (BALCA) decision, the Petitioner contends that the petition's denial violates "notions of fundamental fairness." *See Matter of HealthAmerica*, 2006-PER-0001, *14 (BALCA July 18, 2006) (en banc). We need not follow BALCA decisions, however. *See* 8 C.F.R. § 103.10(b) (requiring USCIS to follow precedent decisions of the Board of Immigration Appeals (BIA) and the Attorney General in proceedings involving the same issues). Also, since July 16, 2007, *HealthAmerica* no longer even binds BALCA. The DOL regulation at 20 C.F.R. § 656.11(b) supersedes the decision's holding by barring modifications to labor certification applications. *See, e.g., Matter of Google LLC*, 2023-PER-00296, *3 (BALCA Sept. 30, 2024).

III. CONCLUSION

For the foregoing reasons, the Petitioner has not demonstrated its claimed intent to accept a foreign high school diploma to meet the offered job's educational requirement. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.