U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10755363

DATE: AUG. 18, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a retail food and liquor distribution and sales business, seeks to employ the Beneficiary as a market development consultant.[1] It requests skilled worker classification for the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Nebraska Service Center initially approved the petition, but subsequently revoked the approval on the grounds that the evidence did not establish that the Beneficiary had the requisite educational credential and work experience to meet the terms of the labor certification and to qualify for skilled worker classification. The Petitioner filed an appeal, which we dismissed on the same grounds.

The matter is now before us on a motion to reopen and a motion to reconsider. Upon review, we will dismiss the combined motion.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. See 8 C.F.R. § 103.5(a)(2). A motion to reconsider must demonstrate that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. See 8 C.F.R. § 103.5(a)(3).

To qualify for classification as a skilled worker a beneficiary must have at least two years of training or experience. See 8 C.F.R. § 204.5(l)(3)(ii)(B). A beneficiary must also meet the specific educational, training, experience, or other requirements of the labor certification. Id. All requirements must be met by the petition's priority date,[2] which in this case is April 16, 2007. See Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

II. ANALYSIS

[1] On the labor certification the position is called a wine marketing consultant.

[2] The priority date of a petition is the date the underlying labor certification is filed with the Department of Labor. See 8 C.F.R. § 204.5(d).

To be eligible for skilled worker classification, therefore, the Beneficiary must meet all specific requirements of the labor certification[3] and have at least two years of relevant experience (or training). In this case section H of the labor certification (Job Opportunity Information) specifies the following with respect to the education, training, and experience requirements for the proffered position:

4.	Education: Minimum level required:	Associate's
4-B.	What field of study?	Any Field
5.	Is training required for the job?	No
6.	Is experience in the job offered required?	Yes
6-A.	How long?	24 months
7.	Is an alternate field of study acceptable?	No
8.	Is an alternate combination of education and experience acceptable?	No
9.	Is a foreign educational equivalent acceptable?	Yes
10.	Is experience in an alternate occupation acceptable?	No

As indicated in the labor certification, the minimum level of education required for the proffered position is "associate's" (section H.4) or a "foreign educational equivalent" (section H.9). The Petitioner did not indicate that an alternate combination of education and experience was acceptable or elaborate on the education requirement in section H.14 ("Specific skills or other requirements"). Sections J.11 to J.16 of the labor certification claim that the Beneficiary's highest level of education relevant to the requested occupation is an "associate's" in the field of marketing completed in 1983 at the University [redacted] India. The Beneficiary signed a declaration in section L of the labor certification that the information provided in section J was "true and correct."

As evidence of the Beneficiary's education the record includes copies of transcripts from the University [redacted] indicating that the Beneficiary completed two years of coursework in a bachelor of science program in the years 1981-1983 and an academic evaluation from [redacted] asserting that the two years of study at the University [redacted] were equivalent to an associate of science degree in the United States. This field of study is not consistent with the field of study claimed in section J of the labor certification.[4]

[3] In determining the minimum requirements of a proffered position, we must examine "the language of the labor certification job requirements." Madany v. Smith, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as it is completed by the prospective employer. See Rosedale Linden Park Company v. Smith, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the labor certification application form. Id. at 834.

[4] The record also includes an "expert opinion evaluation" from a professor at [redacted] University who concluded that that the Beneficiary's two years of academic coursework at the University [redacted] was equivalent to two years of coursework at an accredited institution of higher education in the United States, but does not assert that the coursework was equivalent to an associate's degree in the United States. The evaluation also concluded and that the Beneficiary's work experience in India of "more than 16 years" in the field of marketing during the years 1983-2000 was equivalent to a U.S. bachelor of arts degree in marketing. The evaluation does not identify any specific documentation of the Beneficiary's alleged work experience, referring only to "copies of the original documents provided by [the Beneficiary]."

The labor certification requires 24 months of experience in the job offered (section H.6, H.6-A). In section K of the labor certification only one job is listed for the Beneficiary prior to his employment with the Petitioner.[5] It was with [redacted] in [redacted] California, where the Beneficiary claims to have been employed as a market development consultant 20 hours per week from April 28, 2003, to January 29, 2007. No evidence of the Beneficiary's employment with this company was submitted with the petition. Instead, photocopied letters were submitted from four Indian companies who assertedly employed the Beneficiary in sales and marketing positions over a 17-year period from June 1983 to July 2000. None of this purported employment experience was listed in the labor certification. The Beneficiary's declaration in section L of the labor certification also declares that the information provided in section K is "true and correct."

A. Our Previous Decision

1. Education Issue

In dismissing the appeal we stated that the plain language of the labor certification indicated that the minimum educational requirement for the proffered position is an associate's degree. With regard to the section H.9 entry that a "foreign educational equivalent" was acceptable, we stated that this language must be read in conjunction with the labor certification's basic requirement of an associate's degree and concluded it required a foreign degree which is equivalent to a U.S. associate's degree. The Beneficiary does not have such a degree. If the Petitioner meant to allow for two years of university-level coursework to substitute for an associate's degree, that intent could have been expressed in section H.8 of the labor certification, which asks whether an alternate combination of education and experience would be acceptable and, if so, what level of education and how many years of experience. However, the Petitioner answered "No" to the question of whether an alternate combination of education and experience was acceptable. The Petitioner also did not qualify the educational requirement in section H.14 of the labor certification.

Based on the foregoing analysis we found that the Beneficiary did not meet the minimum educational requirement of the labor certification.

2. Experience Issue

In our decision we noted that the Petitioner did not submit any documentation of the Beneficiary's alleged employment with [redacted] until the appeal, despite the regulatory requirement in 8 C.F.R. § 204.5(g)(1) that letters from former employers must be submitted as evidence of qualifying employment.[6] We stated that even if we accepted the letter from that business newly submitted on appeal as credible evidence of the Beneficiary's employment as a market development consultant, the letter did not establish that the Beneficiary gained two full years of experience in the

[5] While the labor certification states that the Beneficiary began working for the Petitioner as a market development consultant on January 30, 2007, none of the experience gained between then and the priority date of April 16, 2007, counts as qualifying experience since it was gained in the position offered. The labor certification states at section J.21 that the Beneficiary did not gain any qualifying experience in a substantially comparable position to the job offered.

[6] The AAO need not accept evidence offered for the first time on appeal when the petitioner has had the opportunity to submit such evidence earlier in the proceeding. See Matter of Soriano, 19 I&N Dec. 764 (BIA 1988).

job offered because, as indicated in the labor certification, the work was only 20 hours per week, and thus half-time.[7] We found that the Beneficiary's 45 months of half-time employment with [redacted] equated to 22.5 months of full-time employment, which was less than the 24 months required by the labor certification. With regard to the letters from Indian businesses that assertedly employed the Beneficiary in the years 1983-2000, we indicated that the failure to list any of this employment in the labor certification, despite specific instructions on the form to do so, lessened the credibility of the asserted work experience. We also noted that no independent objective evidence had been submitted to resolve certain inconsistencies in, and thereby bolster the credibility of, the four letters in question.

Based on the foregoing analysis we found that the Petitioner did not establish that the Beneficiary had at least 24 months of experience as a market development consultant as of the priority date, as required to meet the experience requirement of the labor certification.

B. Motion to Reopen

1. Education Issue

On motion the Petitioner submits documentation from its recruitment for the proffered position in the form of job advertisement confirmations that were submitted with the labor certification application. Those job ads stated that applicants "[m]ust have [an] Associate Degree in any field or foreign equivalent," which the Petitioner claims is evidence of its intention to accept foreign educational credentials that did not include an associate's degree so long as they were equivalent to such. We do not agree with that interpretation of the job ads. The language of the job advertisements is consistent with the language of sections H.4 and H.9 of the labor certification, in which the Petitioner requires an associate's degree or a foreign educational equivalent. In our previous decision we stated that the labor certification's "foreign educational equivalent" requirement, when read in conjunction with the basic requirement of an associate's degree, means that a foreign equivalent degree was required. If the Petitioner meant to allow for two years of university-level coursework to substitute for an associate's degree, that intent could have been expressed in section H.8 of the labor certification by indicating that an "other" level of education was required rather than an "associate's" level of education. The same principle applies to the job advertisements. If the Petitioner meant to allow two years of university-level coursework to be considered equivalent to an associate's degree, that intent could and should have been expressed in the job ads so that potential U.S. workers would be apprised of the true position requirements.

Therefore, the job advertisement confirmations do not support the Petitioner's claim that they demonstrate its intention to accept anything short of a foreign degree equivalent to a U.S. associate's degree to meet the minimum educational requirement of the labor certification.

[7] While we have found that part-time employment can count toward fulfilling labor certification experience requirements, we will only count part-time employment as a proportionate fraction of full-time employment. See, for example, the non-precedent decisions in Matter of G-D- Corp., ID# 835847 (AAO May 3, 2018), and Matter of T-R-S-, ID# 1108577 (AAO Aug. 1, 2018), which draw on case law from the Board of Alien Labor Certification Appeals (BALCA). While BALCA decisions are not binding on the AAO, they are instructive on certain issues and may provide guidance in our adjudication of particular cases.

2. Experience Issue

On motion the Petitioner submits copies of the materials it submitted in support of prior nonimmigrant petitions it filed on behalf of the Beneficiary for a series of H-1B visas in the years 2003-2009. These materials include the letters from four Indian businesses submitted in the current proceeding as evidence of the Beneficiary's claimed prior employment history. As indicated in our previous decision, however, none of the four jobs the Beneficiary claims to have had in India between 1983 and 2000 was listed in section K of the labor certification (Alien Work Experience), despite the clear instruction to list, in addition to jobs held in the previous three years, "any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification." The failure to list these jobs in the labor certification lessens the credibility of the asserted work experience. See Matter of Leung, 16 I&N Dec. 2530 (BIA 1976). The Petitioner has not submitted any independent objective evidence in support of its claim that the Beneficiary was employed by any of the four Indian businesses – such as pay statements, tax returns, personnel records, or other official documentation – to remedy its failure to list the alleged employment where it should have been listed in the labor certification.

Therefore, the materials from prior H-1B petitions are not sufficient to establish that the Beneficiary gained any qualifying experience in India during the years 1983-2000.[8]

C. Motion to Reconsider

1. Education Issue

On motion the Petitioner asserts that we erred in stating that the Petitioner, if it intended to accept academic coursework as equivalent to an associate's degree, should have done so in section H.8 of the labor certification which asks whether an alternate combination of education and experience is acceptable and, if so, what level of education and the number of years. According to the Petitioner, section H.8 was inapplicable in its case because the language refers to an alternate combination of education AND experience while the Petitioner was not considering an alternative to its experience requirement of two years. We do not agree with the Petitioner's interpretation of section H.8, whose language does not specify that the education and experience requirements must both be changed to constitute an alternate combination of education and experience. Additionally, the Petitioner could have expanded on any alternate education requirement in section H.14, but did not.

The Petitioner cites the U.S. district court decision in Grace Korean United Methodist Church v. Chertoff, 437 F. Supp. 2d 1174 (D. Or. 2005), which held that the labor certification requirement of a "bachelor's degree (B.A.) or equivalent in field of theology" could be met in that case with a combination of education and experience that did not include an actual bachelor's degree to qualify the beneficiary for skilled worker classification. The Petitioner asserts that the decision in Grace Korean is binding on the AAO, but that is incorrect. District court decisions are fact specific.

[8]We note that the requirements of H-1B petitions are different than I-140 petitions and the letters would be used in a different context in the I-140 filing.

Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. See Matter of K-S-, 20 I&N Dec. 715, 719 (BIA 1993).[9] Additionally, Grace Korean precedes use of the ETA Form 9089, and the labor certification in that matter was on the predecessor Form ETA 750. The ETA Form 9089 provides spaces to state alternative requirements for education and experience in section H.8. or to elaborate on requirements in section H.14.

The Petitioner also cites a decision by the Board of Alien Labor Certification Appeals (BALCA), Productivity Improvements, Inc., 86-INA-671 (BALCA 1988) in which the Board allegedly approved the labor certification application requiring a bachelor's degree even though the beneficiary only completed the coursework without obtaining an actual degree. The Petitioner has not submitted a copy of the decision to support its interpretation of the BALCA ruling. Moreover, as previously noted BALCA decisions, like U.S. district court decisions, are not binding on the AAO. Additionally, as the case was decided in 1988, it precedes use of the current ETA Form 9089, which provides a space to state alternate requirements in section H.8.

Therefore, the Petitioner has not established that our previous decision on the issue of the minimum educational requirement was based on an incorrect application of law or policy.

2. Experience Issue

On motion the Petitioner asserts that its failure to list the Beneficiary's alleged employment with four Indian businesses in section K of the labor certification should not cause us to "completely disregard" the letters submitted as evidence of that employment. While acknowledging that we may give lesser evidentiary weight to claims of employment not listed in the labor certification, citing Matter of Leung, The Petitioner maintains that we cannot ignore them. The Petitioner points out that the subject letters were submitted to U.S. Citizenship and Immigration Services (USCIS) in support of the earlier H-1B petitions on behalf of the Beneficiary that were approved, and that the letters were utilized in the 2003 "expert opinion evaluation" from the professor at [redacted] University (also submitted to USCIS) which concluded that the Beneficiary's "more than 16 years" of experience in India was equivalent to a U.S. bachelor of arts degree in marketing. The Petitioner asserts that the mismatching fonts and spacing issues we cited in our previous decision likely resulted from the fact that at least three of the four letters were prepared on a typewriter.

We agree that Matter of Leung does not preclude us from considering the letters from Indian businesses claiming that they employed the Beneficiary during the years 1983-2000. As indicated in our previous decision, however, independent objective evidence of the Beneficiary's employment with the Indian businesses was needed to resolve the inconsistencies in those letters, citing Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). The submission of such evidence (such as pay statements, personnel records,

[9] The AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions of the federal court of appeals from whatever circuit that the action arose. See N.L.R.B. v Ashkenazy Property Management Corp., 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); R.L. Inv. Ltd. Partners v. INS, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), aff'd, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the Administrative Procedures Act, even when they are published in private publications or widely circulated).

tax returns, or other official documentation) could also help to bolster the overall credibility of the letters. As previously discussed, no such evidence has been submitted on motion. It is the Petitioner's burden in this visa petition proceeding to establish eligibility for the immigration benefit it seeks. See section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met its burden.

Therefore, the Petitioner has not established that our previous decision on the issue of the Beneficiary's qualifying experience was based on an incorrect application of law or policy.

III. CONCLUSION

The Petitioner has not shown proper cause for reopening or reconsideration of our previous decision, nor established eligibility for the benefit sought.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.