U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-B-O-N-S-

DATE: JAN. 17, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an international bank, seeks to employ the Beneficiary as a senior project administrator, Latin America. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based 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 2 years of training or experience.

The Director, Texas Service Center, denied the petition. The Director determined that the record did not establish that the Beneficiary had the U.S. high school diploma required by the labor certification.

The matter is before us on appeal. The Petitioner asserts that the Beneficiary's completion of secondary school in Argentina satisfies its educational requirements for the offered position.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by DOL, must accompany the petition. By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certifies that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II) of the Act.

In visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified in the underlying labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has the authority to make preference classification decisions).

The priority date of a petition is the date that DOL accepts the labor certification for processing. *See* 8 C.F.R. § 204.5(d). The priority date is used to calculate when the beneficiary of a visa petition is eligible to adjust his or her status to that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In the instant case, the priority date is July 23, 2015.

II. ANALYSIS

The labor certification states the following requirements for the offered position of senior project administrator, Latin America:

H.4.	Minimum education required: High school.
H.5.	Training: None required.
H.6.	Experience in the job offered: Required.
H.6-A.	Number of months experience in job offered: 120.
H.7.	Alternate field of study: None accepted.
H.8.	Alternate combination of education and experience: None accepted.
H.9.	Foreign educational equivalent: None accepted.
H.10.	Experience in an alternate occupation: Accepted.
H.10-A.	No. of months experience in alternate occupation: 120.
H.10-B.	Job title of alternate occupation: Office manager & administrator, executive assistant or related.
H.14.	Specific skills or other requirements: Must have ten (10) years of experience utilizing a high level of discretion in dealing with confidential matters and clients. Prior experience must include utilizing computers and related software including Microsoft Office; working with technical oil and gas numerical data including engineering and geoscience data; and fluency in Spanish and Portuguese to communicate with Latin American based clients.

With the petition, the Petitioner provided a copy of the English-language translation of a certificate issued by the [redacted] which reflects the courses completed by the Beneficiary at the [redacted] "leading to

the TITLE OF PROFESSIONAL DECORATOR," which the translated certificates states, "corresponds to the COMPLETION OF HIGHER EDUCATION." The Petitioner also submitted the Beneficiary's resumé, which reflects that the Beneficiary has a "degree" in interior design.

On February 17, 2016, the Director issued a request for evidence (RFE) to the Petitioner, informing it that although it had submitted the English-language translation of the certificate issued by the the translation was not acceptable in the absence of the document from which it had been translated. The Director also advised the Petitioner that, as Part H.9. of the labor certification indicated that the Petitioner would not accept a foreign educational equivalent, the Petitioner must establish that the Beneficiary had the U.S. high school diploma required by the labor certification.

The Petitioner replied to the RFE on May 12, 2016. In its response, the Petitioner provided the previously submitted translated certificate documenting the courses taken by the Beneficiary at and a Spanish-language academic transcript issued to the Beneficiary by on March 15, 1990, which was not accompanied by an English-language translation. The Petitioner also submitted an evaluation of the Beneficiary's training and employment experience, prepared by Ph.D., which found her employment history to provide her with the equivalent of a U.S. bachelor's degree in business administration, with a concentration in management. The Petitioner also provided a May 2, 2016, expert opinion from an evaluator at in New York, who states that the Argentine *ciclo del bachillerato con orientacion* is a credential awarded upon the completion of secondary education "at a level equivalent to our grade twelve, the purpose of which is to study at the university level."

In its accompanying letter, the Petitioner asserted that it found what it described as DOL's silence on degree equivalency issues for high school degrees to suggest that "a high school degree earned in any country is the equivalent [of] a U.S. high school degree" and that the Petitioner's negative response in Part H.9. of the labor certification was, therefore, correct "as there is no applicable definition for the 'foreign equivalent' of a U.S. high school degree." The Petitioner also proposed that USCIS defer to DOL's approval of the labor certification in this matter, noting that U.S. federal courts have found that it is DOL, and not USCIS, that should "construe" the job qualifications listed in a labor certification. In support of this claim, the Petitioner pointed to the decisions in *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), and *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 *5 (D. Or. Nov. 30, 2006).

The Director denied the visa petition on May 19, 2016, concluding that the Petitioner's response to the RFE had not established that the Beneficiary held the U.S. high school diploma required by the labor certification. The Director indicated that the record did not establish how the title of professional decorator related to a high school diploma. He further concluded that, as the labor certification did not allow for the acceptance of a foreign equivalent of a U.S. high school diploma, the Petitioner could not rely on the opinions provided by and to establish the Beneficiary's academic qualifications for the offered position.

On June 13, 2016, the Petitioner appealed the Director's decision, asserting that the Director's decision contradicts "the regulations that govern PERM degree equivalency" and our prior decisions, "which direct USCIS [to] defer to the [DOL]'s review and approval of the underlying ETA Form 9089." On appeal, the Petitioner submits a brief, which is supported by new and previously-submitted evidence.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *Madany, supra*, 696 F.2d at 1012-13. We must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to 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. *Id.* at 834.

In this matter, the Director determined that the Beneficiary does not have the U.S. high school diploma required by the labor certification. In his May 19, 2016, decision, the Director noted that the Petitioner had submitted a certificate that demonstrated that the Beneficiary had completed the courses necessary for the title of professional decorator, which corresponded to the completion of higher education. He did not, however, find the record to establish that this certificate was a high school diploma in Argentina or that, even if it were so established, that the labor certification allowed the Beneficiary to qualify for the offered position with a credential awarded by a secondary school outside the United States.

On appeal, the Petitioner responds to the Director's finding that the Beneficiary's title of professional decorator is not established by the record as a high school diploma by pointing to the opinion prepared by [redacted] at [redacted] which, it contends, finds the Beneficiary's "degree" to be the same as a U.S. high school diploma. However, the Petitioner mischaracterizes [redacted] report.

[redacted] opinion does not indicate that it is based on a review of the Beneficiary's [redacted] transcript or that the certificate documenting the courses she completed at the [redacted] provides her with the equivalent of a U.S. high school diploma. Instead, his May 2, 2016, report offers his opinion that most secondary school certificates from developed countries are equivalent to a U.S. high school diploma, and, specifically, that the Argentine educational credential of *ciclo del bachillerato con orientacion* is one such equivalent. [redacted] does not, however, indicate that he finds the Beneficiary to hold this credential. Therefore, his opinion does not support the Petitioner's assertion that the certificate reflecting the courses taken by the Beneficiary at the [redacted] establishes her academic qualifications for the offered position.

Further, unlike the Director, we do not find this certificate to demonstrate that the Beneficiary holds the title of professional decorator. The English-language translation of the certification issued by the [redacted] does not establish that the Beneficiary holds the title of professional decorator. The translation of the certification only establishes that the Beneficiary has completed courses "leading to" the title of professional decorator. Under the heading, "Observations," the certificate reads: "[The Beneficiary] . . . IN ORDER TO OBTAIN THE TITLE OF PROFESSIONAL DECORATOR, SHOULD TAKE AND PASS THE PENDING COURSES PERTAINING TO THE 1ST, 2ND, 3RD YEAR." Therefore, at the time of the Director's decision, no evidence submitted by the Petitioner established that the Beneficiary had graduated from a secondary school in Argentina.[1]

On appeal, the Petitioner submits Spanish- and English-language copies of the Beneficiary's academic transcript from the [redacted] which reflects that the Beneficiary was awarded a *titulo de bachiller* on March 15, 1990. These transcripts are accompanied by a third expert opinion regarding the Beneficiary's academic credentials prepared by [redacted] for [redacted] February 22, 2016, report finds that the Beneficiary's *titulo de bachiller* is the equivalent of a U.S. high school diploma, a determination that is supported by credentials advice from the Electronic Database for Global Education (EDGE), a resource that USCIS routinely consults in determining educational equivalencies.[2] However, while we have considered this evidence, we, like the Director, do not find the Beneficiary's possession of the Argentine equivalent of a U.S. high school diploma to satisfy the educational requirements of the labor certification.

To designate the minimum level of education required for the offered position, the Petitioner checked the box labeled "High School" in Part H.4. of the labor certification. It subsequently answered "No" to the question in Part H.9. of the labor certification, "Is a foreign educational equivalent acceptable?" In this case, the only logical interpretation of the minimum educational requirements based on the Petitioner's negative answer in Part H.9. is that the required high school diploma must be a U.S. high school diploma. Therefore, reading the labor certification's academic requirements as a whole, we find that the Beneficiary must hold a U.S. high school diploma in order

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[1] Even if the translated certificate did reflect the Beneficiary's completion of secondary school, it could not be considered in this matter as the Petitioner has not provided the Spanish-language document on which it is based. In response to the Director's RFE asking for this document, the Petitioner provided a copy of the Beneficiary's Spanish-language transcript from [redacted] which the Director mistakenly concluded was the document he had requested. However, even if the Director had noted the discrepancy between the documents, he could not have considered the transcript from the [redacted] as credible evidence, as it was not accompanied by a certified English-language translation pursuant to the regulation at 8 C.F.R. § 103.2(b)(3).

[2] EDGE was created by the created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in more than 40 countries." *About AACRAO*, http://www.aacrao.org/home/about (last visited Dec. 16, 2016). According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." *AACRAO EDGE*, http://edge.aacrao.org/info.php (last visited Dec. 16, 2016).

to qualify for the job opportunity, a requirement that is not satisfied by the Beneficiary's certificate from the [redacted] in Argentina.

On appeal, the Petitioner asserts that USCIS has erred in considering the Beneficiary's *titulo de bachiller* to be the foreign equivalent of a U.S. high school degree when DOL's silence on degree equivalency issues with respect to high school degrees suggests that all high school degrees are "effectively the same as a U.S. high school degree." Without an applicable definition for the foreign equivalent of a high school degree, the Petitioner asserts, its negative response to the question in Part H.9. of the labor certification does not preclude the Beneficiary from qualifying for the job opportunity based on her *titulo de bachiller*. The Petitioner also maintains that USCIS should conclude that the Beneficiary is qualified for the job opportunity as DOL has already reviewed the ETA Form 9089 in its entirety and would not have approved the application had it considered the Beneficiary to hold the foreign equivalent of a U.S. high school diploma. Finally, the Petitioner points to the decisions in *Grace Korean United Methodist Church, supra,* 437 F. Supp. 2d at 1174, and *Snapnames.com, Inc., supra*, 2006 WL 3491005 at *5, and asks that USCIS follow this "established case law precedent" and defer to "DOL's determination that [the Beneficiary] personally meets the minimum requirements, including the educational requirements" of the labor certification.

The role played by DOL in the employment-based immigrant visa process is established by section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Significantly, none of the above inquiries assigned to DOL or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the beneficiary are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-*

> *Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[3] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany, supra, 696 F.2d at 1008, 1012-1013. Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.

[3] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

Id. at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The [DOL] must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir. 1983). The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is DOL's responsibility to determine whether there are qualified U.S. workers available to perform the duties of an offered position, and whether the employment of a beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if a beneficiary qualifies for the offered position, and whether an offered position and a beneficiary are eligible for the requested immigrant visa classification. Accordingly, we do not find DOL's approval of the labor certification in this matter to establish that the Beneficiary meets the minimum requirements of the labor certification.

The Petitioner also indicates on appeal that that USCIS is bound to follow the decisions in *Grace Korean United Methodist Church, supra,* 437 F. Supp. 2d at 1174, and *Snapnames.com, Inc., supra*, 2006 WL 3491005 at *5, which, it asserts, stand for the proposition that it is DOL not USCIS that should construe the job qualifications listed in a labor certification. The Petitioner contends that both cases are applicable in this matter, as the labor certification was filed with the Beneficiary's credentials in mind and DOL approved the labor certification aware that the Petitioner had indicated it would not accept a foreign equivalency and that the Beneficiary had obtained her education in Argentina.

In *Grace Korean United Methodist Church,* the court concluded that USCIS "[did] not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification" and further that "[i]f any agency has the power to define the job qualifications set forth in a labor certification, it is the DOL." *Grace Korean United Methodist Church,* 437 F. Supp. 2d at 1179. Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, 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). A judge in the same district, however, subsequently held that the assertion that DOL certification precludes USCIS from considering whether the beneficiary meets the educational requirements specified in the labor certification is wrong. *Snapnames.com, Inc.*, 2006 WL 3491005 at *5. The court recognized that even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7.

Further, the record does not support the Petitioner's contention that DOL certified the ETA Form 9089 in this case "knowing [the Beneficiary's] personal credentials."

Part J. of a labor certification sets forth a beneficiary's qualifications for the job opportunity offered by an employer. In this case, it provides the following information regarding the qualifying education claimed by the Beneficiary:

J.11. Highest level of education achieved: High school.
J.12. Major field of study: Interior design.
J.13. Year relevant education completed: 1992.
J.14. Institution where education received: Argentina.

This is not, however, the qualifying high school education documented by the Spanish- and English-language certificates from the that the Petitioner has submitted on appeal and which, it contends, establishes the Beneficiary's educational qualifications for the offered position. Moreover, as previously discussed, the transcript of the courses taken by the Beneficiary at does not establish that she received a diploma, only that she completed certain coursework in 1992 and 1993 "leading" to such a diploma.

Finally, the Petitioner asserts that USCIS has erred in considering the Beneficiary's secondary school certificate as the foreign equivalent of a U.S. high school diploma since "all high school degrees are effectively the same as a U.S. high school degree." The Petitioner bases its claim on what it describes as DOL's silence on degree equivalencies for U.S. high school diplomas and concludes that the agency's silence "is indicative that there is no such category for a 'foreign equivalent' of a high school degree." However, the Petitioner has provided no evidence in support of this claim. The Petitioner cannot meet its burden of proof in this matter simply by claiming a fact to be true, without supporting documentary evidence. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). A petitioner must support assertions with relevant, probative, and credible evidence. *Chawathe*, at 369.

For the reasons already discussed, we do not find the record to demonstrate that the Beneficiary had the U.S. high school education required by the labor certification as of the visa petition's July 23, 2015, priority date. Although on appeal, the Petitioner has submitted an academic transcript that reflects the Beneficiary was awarded a *titulo de bachiller*, or the foreign equivalent of a U.S. high school diploma, by the on March 15, 1990, this credential does not qualify her for the offered position.

While Part H.4. of the labor certification reflects that the Petitioner's minimum educational requirement for the offered position is a high school diploma, Part H.9. indicates that the Petitioner will not accept a foreign educational equivalent. Therefore, the Beneficiary's Argentine secondary school diploma does not meet the requirements of the labor certification.

III. CONCLUSION

The Petitioner has not established that the Beneficiary has the U.S. high school diploma required by the labor certification. Therefore, the petition may not be approved.

In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of T-B-O-N-S-*, ID# 48737 (AAO Jan. 17, 2017)