U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29359149

Date: JAN. 18, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree or Exceptional Ability)

The Petitioner, a wholesale retailer, seeks classification of the Beneficiary as a member of the professions holding an advanced degree or as an individual of exceptional ability. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Nebraska Service Center initially denied the petition based on not demonstrating the offered position requires a professional holding an advanced degree. On appeal, we remanded the decision to the Director to determine whether the labor certification supports the classification of an individual of exceptional ability or whether the Petitioner has established that the Beneficiary qualifies as an individual of exceptional ability. Subsequently, the Director again denied the petition, concluding the Petitioner did not show that the position requires an individual of exceptional ability. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

Employment-based immigration as an advanced degree professional or as an individual of exceptional ability generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (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 an 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). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(k)(3)(i)(B).

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).

At the outset, the Petitioner asserts that a "labor certificate is irrelevant for the EB-2 immigrant petition" and the "agency's regulations and form instructions requiring a labor certification in this context are ultra vires." We need not further address these claims because the Petitioner made these same arguments in the first appeal, which we addressed in our prior decision, and does not offer any new information in this appeal to overcome our determination on this issue.

Moreover, the Petitioner argues that the petition qualifies for being a member of a profession holding an advanced degree. As indicated in the Director's first decision, the labor certification (H4) indicated that there is no minimum level of education required for the position of an "SAP Security Analyst." Regardless of the Petitioner's claim of the Beneficiary possessing an advanced degree, the position, according to the labor certification, does not require one. The regulation at 8 C.F.R. § 204.5(k)(4)(i) states that "[t]he job offer portion of the individualized labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability."[1] Because the labor certification reflects that an advanced degree is not required for the position, the Beneficiary cannot be considered for classification as a member of the professions holding an advanced degree.

Similarly, the Petitioner asserts "there's no such requirement that the job position itself must require exceptional ability." On the contrary, as indicated above, the regulation at 8 C.F.R. § 204.5(k)(4)(i) requires that "[t]he job offer of the individualized labor certification . . . must demonstrate that the job requires . . . an alien of exceptional ability." Although the Petitioner makes claims regarding the Beneficiary's eligibility as an individual of exceptional ability, the Petitioner does not argue that the position of an "SAP Security Analyst" requires exceptional ability.[2] Here, the labor certification requires no minimum level of education (H4), no training (H5), and no experience in the position (H6). In addition, the Petitioner did not establish that any additional job duties listed on the labor certification for the position involves exceptional ability. USCIS must examine the job-offer portion of an accompanying labor certification to determine the offered position's minimum requirements. USCIS 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). For these reasons, the Petitioner did not show the labor certification requires an individual of exceptional ability.

ORDER: The appeal is dismissed.

[1] *See also* 6 *USCIS Policy Manual* F.5(A)(1), https://www.uscis.gov/policymanual (stating that the position certified in the underlying permanent labor certification application or Schedule A application must require, at a minimum, a professional holding an advanced degree or the equivalent).

[2] Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).