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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF [redacted]

DATE: JAN. 25, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a public school system, seeks to classify the Beneficiary as a chemistry teacher of exceptional ability. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish that the position requires someone of exceptional ability.

The matter is now before us on appeal. In its appeal, the Petitioner submits a decision by the Board of Alien Labor Certification Appeals (BALCA) and maintains that the Director erred in his analysis of the evidence.

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

I. LAW

Section 203(b)(2) of the Act provides classification to qualified individuals who are members of the professions holding advanced degrees or their equivalent, or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States. The implementing regulation at 8 C.F.R. § 204.5(k)(2) states: "Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." Unless seeking a waiver in the national interest, the petition must be accompanied by a valid, individual labor certification or an application for Schedule A delegation that demonstrates the job requires an individual of exceptional ability. 8 C.F.R. § 204.5(k)(4)(i). In the instant case, the Petitioner secured an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

In explaining the evidentiary requirements, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria related to exceptional ability. Specifically, a petitioner must provide documentation that

satisfies at least three of these criteria in order to meet the initial requirements for this classification. The submission of sufficient initial evidence does not, however, in and of itself establish eligibility. If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality").[1]

II. ANALYSIS

The Director determined that the position did not require an individual of exceptional ability. On appeal, the Petitioner maintains that, as it followed the permanent labor certification process (PERM) with DOL, U.S. Citizenship and Immigration Services (USCIS) is limited in its review of the Beneficiary's credentials and job requirements, and may not consider whether the job requirements in the aggregate are consistent with the regulatory definition of exceptional ability. For the reasons discussed below, the record supports the Director's decision. In addition, while the Director concluded that whether the Beneficiary is exceptional is "moot," we find that is a relevant issue. As explained below, the Petitioner has not established that the Beneficiary meets the requirements for exceptional ability.[2]

A. The Job Requirements

The job offer portion of the individual labor certification must demonstrate that the position requires an individual of exceptional ability. 8 C.F.R. § 204.5(k)(4)(i). The job certified by DOL, secondary school teacher, has a specialty occupation classification (SOC) code of 25-2031. The labor certification reflects that the position requires "a Bachelor's degree or combination of education equivalent to a Bachelor's" in education, chemistry or a related field; no experience in the job offered or an alternate occupation; and eligibility for state licensing. The Petitioner identified the prevailing wage as $43,362 per year and the proposed wage range from that amount to $71,235 annually. The Petitioner supplied Foreign Labor Certification (FLC) wage data for those working in the occupation with the SOC code 25-3099, teachers and instructors, all other. The data shows an annual wage range of $20,470 through $44,900. The Petitioner also presented information about the [redacted] which oversees all state-funded education, contending that all teachers are automatically members of this entity. We will discuss the criteria individually first and then consider the Petitioner's contention that, once it is established that the labor certification requires three elements of exceptional ability, no further analysis is permissible.

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[1] *Cf. Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination).

[2] As recognized by federal courts, we conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

1. Evidentiary Criteria

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(A).

The Director found that the education requirements for the job meet this criterion. The labor certification does not require a bachelor's "degree," other combinations of education equivalent to that degree are also acceptable, including a diploma, certificate, or similar award from a college or university. In order to be considered equivalent to a bachelor's degree, the education must have resulted in some type of credential from an institution of higher learning. Accordingly, we agree with the Director that the education requirement conforms to one of the exceptional ability criteria.

A license to practice the profession or certification for a particular profession or occupation. 8 C.F.R. § 204.5(k)(3)(ii)(C).

The Director concluded that requiring eligibility for licensure is not the same as requiring possession of this credential. On appeal, the Petitioner maintains that the labor certification requires eligibility for a New York State teaching license because "[n]o one can teach in New York without licensure." The Petitioner continues that because, by law, all teachers in the state must be certified, the position requires a license or certification. We accept that the job requires a license or certification. Therefore, the job requires a second element under the exceptional ability criteria.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D).

The Director found the Petitioner had not established that the offered salary is consistent with exceptional ability as the submitted FLC data was for a different SOC code than the occupation certified. On appeal, the Petitioner maintains that, because the Petitioner is affiliated with universities, DOL requires it to use the American Competitiveness and Workforce Improvement Act (ACWIA) Education database for prevailing wages rather than the SOC code on the labor certification. The Petitioner contends that the proposed wage is two to three times higher than DOL's wage data for a science teacher in the local area.

Regardless of whether DOL requires the Petitioner to use ACWIA because it is affiliated with a university system, it has not shown that the data provided, entry level wages for SOC code 25-3099, "Teachers and Instructors, All Other," is a meaningful comparison to the offered wage for a secondary teacher.[3] The Petitioner does not support its contention on appeal that this amount

[3] O*Net includes SOC codes for middle school teachers and elementary school teachers, SOC codes 25-2022, 25-2021 respectively, as well as the 25-2031 code for secondary teachers. *See* O*NET OnLine Quick Search for teachers, http://www.onetonline.org/find/quick?s=teachers. As such, the statistics for the SOC code 25-3099 omit the salaries of all primary and secondary teachers.

represents "wage data for a science teacher." It remains that the bottom range of the proposed wage matches the prevailing wage listed on the labor certification. The Petitioner has not demonstrated that tendering the prevailing wage indicates that the job requires an individual of exceptional ability.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Director noted that membership is not expressly mentioned on the labor certification and determined that the requirement was not "subsumed" in the document. On appeal, the Petitioner submits BALCA case law for the proposition that a labor certification need not list requirements that are inherent to the position and state statutes regarding certification of teachers. That case reviewed whether poor references could serve as a basis for rejecting applicants, finding acceptable unlisted requirements such as reliability, speaking English, and being a non-smoker for an infant caretaker position. *Matter of Androscoggin Jr-Sr Camp for Boys*, 1994 INA 216 (BALCA 1995). Accepting that some self-evident qualifications need not be listed on the labor certification, the Petitioner has not established that a membership requirement is inherent to the position in this case.

The Petitioner's position is that the Beneficiary is a member of the and , "a professional association [of] which, per the New York State Constitution, all teachers become members, by operation of law." The state constitution requires the legislature to provide for the maintenance and support of a system of free common schools and recognizes as the entity with oversight over that system. Materials in the record describe as "the most complete, interconnected system of educational services in the United States," including 240,000 certified public school teachers, counselors, and administrators. The Petitioner has not documented that the 240,000 public school employees oversees are "members" of that entity. The appellate brief contends that "membership" in is automatic, compulsory, and "is actually written into" the state constitution. However, the constitution makes no mention of "members" of ; rather, it recognizes the entity's existence. Unsupported statements in a brief do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, the other information the Petitioner presented about makes no mention of "members." Instead, it shows that the organization oversees public education. Those responsibilities do not imply it is a professional association that admits members automatically or otherwise. In light of the above, the Petitioner has not demonstrated that the job requires membership in

Next, the Petitioner maintains that, because the wage offer information comes from the collective bargaining agreement (CBA) negotiated by , membership in that union "is subsumed within the required wage section of the job offer portion of the PERM application." The Petitioner further notes that it provided with a notice of filing. The Petitioner does not sufficiently explain how the fact that wages were negotiated by a union indicates that the job requires union membership. Accordingly, it has not demonstrated that the job requires a professional membership.

2. Summary

For the reasons described above, the job requirements do not contain at least three elements relating to exceptional ability.

3. The Job Requirements in the Aggregate

Even if we accepted that the labor certification addressed three exceptional ability criteria, the requirements for all of those elements are inherent to the occupation. Regarding the Petitioner's contention on appeal that simply addressing at least three exceptional ability elements on the labor certification is sufficient without further analysis, the relevant statute, case law, a precedent decision, and USCIS policy all support a two-step analysis. The statute expressly advises that "the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability." Section 203(b)(2)(C) of the Act. Thus, the statute contemplates that USCIS will consider on a case-by-case basis whether an individual's credentials are, in fact, indicative of the necessary level of expertise. A federal circuit court considered a first preference petition that, while not a PERM case, involved regulations that similarly list criteria that may demonstrate eligibility.[4] That court found that while USCIS is limited to the plain language of the regulation when considering whether a criterion is satisfied, USCIS may then perform a final merits determination that analyzes the filings in the aggregate.[5] The Petitioner has not sufficiently explained why the court's reasoning is not persuasive to PERM cases.[6] Similarly, as quoted above, a USCIS precedent clarifies that we look not simply at the quantity but also the quality of the documentation.[7] Finally, it is USCIS policy that we perform a two-step analysis in exceptional ability cases.[8] The relevant memorandum does not distinguish between these cases whether based on a PERM labor certification, Schedule A, or a national interest waiver of the job offer. Accordingly, we will review whether the job requirements considered together are indicative of exceptional ability.

The Petitioner has not stated or documented that a bachelor's degree or an equivalent combination of education is above that ordinarily encountered among teachers. The Petitioner has shown that certification is a requirement for all teachers in the state. Assuming that is a professional

[4] *Kazarian v. USCIS*, 596 F.3d at 1115.
[5] *Id.*
[6] While it certified the labor certification, DOL determines only that there are not sufficient workers who are able, willing, qualified, and available and that the employment will not adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act. USCIS has the authority to make preference classification decisions. *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983). *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984).
[7] *Chawathe*, 25 I&N Dec. at 376.
[8] USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* 4, 20-23 (Dec. 22, 2010), https://www.uscis.gov.laws/policy-memoranda.

association that admits members, the Petitioner maintains that membership is automatic for every public school teacher. The record also does not contain evidence that union membership is reflective of a degree of expertise in the sciences, arts, or business. Finally, the Petitioner confirms that the union negotiates the salaries for teachers; accordingly, the offered wage is standard for all teachers. All of these factors in the aggregate demonstrate that the job does not require an individual with a degree of expertise above that ordinarily encountered in the sciences, arts, or business.

B. Exceptional Ability Analysis

As an additional issue, the Petitioner has also not demonstrated that the Beneficiary is an individual of exceptional ability. For the reasons discussed above, relevant statute, case law, a precedent decision, and USCIS policy all support a two-step analysis. Therefore, we will review the Beneficiary's credentials under the criteria separately and in the aggregate.

1. Evidentiary Criteria

The Beneficiary began earning an annual salary of $76,706 as of May 1, 2015. However, the Petitioner provided wage data for a different occupation than the one the Beneficiary holds. Thus, the record does not resolve whether this wage is indicative of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(D). As noted above, the union negotiates the salaries for teachers; accordingly, the Beneficiary's salary is standard for a teacher with his level of experience. The Beneficiary does, however, meet three different criteria. Specifically, the Beneficiary holds a master's degree in English from , a bachelor of science degree in chemistry, mathematics, and physics from the and a bachelor of education from . The record does not contain an evaluation of these degrees and the academic records do not confirm whether either of the Beneficiary's bachelor's degrees was a 4-year degree. diploma indicates the Beneficiary obtained that degree in 1976 and his transcript for 1975 indicates it was his second year. The Petitioner offered only 1 year of marks for the degree from Nevertheless, the record demonstrates that the Beneficiary has a degree, diploma, certificate, or similar award from a college or university as required by 8 C.F.R. § 204.5(k)(3)(ii)(A). Next, the Beneficiary is certified by the Education Department to teach chemistry in grades 7-12. Thus, the record demonstrates that the Beneficiary meets the license or certification criterion. 8 C.F.R. § 204.5(k)(3)(ii)(C). Finally, the Petitioner documented the Beneficiary's membership with and, as such, meets the professional membership criterion. 8 C.F.R. § 204.5(k)(3)(ii)(E).

2. Evidence in the Aggregate

As the Petitioner satisfied three of the regulatory criteria, we now consider the totality of the record to determine if it has demonstrated, by a preponderance of the evidence, that the Beneficiary is an individual with a degree of expertise significantly above that ordinarily encountered in the sciences,

arts, or business.[9] If so, the Petitioner has met the requisite burden of proof and established eligibility for visa classification as a foreign national of exceptional ability.[10]

Although the Beneficiary has multiple foreign degrees, the record does not include an evaluation of them to demonstrate their equivalence in the United States. The Beneficiary also has the minimum licensure for the job and joined the union. The Petitioner has not established that the Beneficiary's education exceeds that typically encountered among teachers, the license is required, and no evidence suggests union membership is indicative of exceptional ability as a teacher. Therefore, the record does not demonstrate these factors confirm a degree of expertise as a teacher significantly above that ordinarily encountered in the sciences, arts, or business.

3. Summary

While the Petitioner satisfied three of the criteria, it did not demonstrate that the Beneficiary's credentials are indicative of a degree of expertise significantly above that ordinarily encountered rather than prerequisites for employment in the occupation or commonly seen. Accordingly, the Petitioner has not established the Beneficiary's eligibility for classification as an individual of exceptional ability.

III. CONCLUSION

The Petitioner has not demonstrated that the job requires an individual of exceptional ability or that the Beneficiary has such expertise. Accordingly, the Petitioner has not met its burden to establish eligibility for the immigration benefit sought. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The appeal is dismissed.

Cite as *Matter of* [redacted], ID# 85980 (AAO Jan. 25, 2017)

[9] 8 C.F.R. § 204.5(k)(2) (definition of exceptional ability). Eligibility is to be determined not by the quantity of the filings alone but by their quality. *Chawathe*, 25 I&N Dec. at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm'r 1989)). We "examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence." *Id.*

[10] *See* section 203(b)(2)(A), (C) of the Act; 8 C.F.R. § 204.5(k)(2), (3)(ii); *cf. Kazarian*, 596 F.3d at 1119-20.