U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF PGNA-, PLLC

DATE: JAN. 26, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an architectural firm, seeks to employ the Beneficiary as architectural project staff. It requests classification of the Beneficiary as a member of the professions holding an advanced degree professional under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition, concluding that the Petitioner had not established that the Beneficiary met the experience requirements of the offered position. The Petitioner appealed the matter, and we affirmed the Director's decision. We held that the terms of the ETA Form 9089, Application for Permanent Employment Certification (labor certification), in Part H.6, requiring 3 years of experience in the job offered, and Part H.14, requiring 3 years of architectural design experience, must be read together and that the Petitioner must meet both requirements. In addition, we held that the Beneficiary's experience with the Petitioner as a staff architect does not qualify her for the position offered.

The matter is now before us on a motion to reopen and reconsider. The Petitioner states that Part H.14 of the labor certification should be understood to clarify the job requirements of the labor certification and that the Petitioner intended for the position offered to require 3 years of architectural design experience but not 3 years of experience in the job offered. The Petitioner states that the Beneficiary gained qualifying experience with the Petitioner as a staff architect.

Upon review, we will deny the motion to reopen and reconsider.

I. LAW

A. Requirements for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) limits a U.S. Citizenship and Immigration Services (USCIS) officer's authority to reopen the proceeding or reconsider the decision to instances where "proper cause" has been shown for such action.

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B, Notice of Appeal or Motion, that is properly completed and signed, and accompanied by the correct fee), but the Petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), "Processing motions in proceedings before the Service," "[a] motion that does not meet applicable requirements shall be dismissed."

B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), "Requirements for motion to reopen," states: "A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence."

This provision is supplemented by the related instruction at Part 4 of the Form I-290B, which states: "**Motion to Reopen**: The motion must state new facts and must be supported by affidavits and/or documentary evidence demonstrating eligibility at the time the underlying petition or application was filed." [1]

Further, the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

C. Requirements for Motions to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(3), "Requirements for motion to reconsider," states:

> A motion to reconsider must [(1)] state the reasons for reconsideration and [(2)] be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must [(3)], when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

These provisions are augmented by the related instruction at Part 4 of the Form I-290B, which states: "**Motion to Reconsider**: The motion must be supported by citations to appropriate statutes,

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[1] The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

> Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter I to the contrary, and such instructions are incorporated into the regulations requiring its submission.

regulations, or precedent decisions when filed and must establish that the decision was based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence of record at the time of decision."

A motion to reconsider contests the correctness of the prior decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new facts. *Compare* 8 C.F.R. § 103.5(a)(3) and 8 C.F.R. § 103.5(a)(2). A motion to reconsider should not be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991) ("Arguments for consideration on appeal should all be submitted at one time, rather than in piecemeal fashion."). Rather, any "arguments" that are raised in a motion to reconsider should flow from new law or a *de novo* legal determination that could not have been addressed by the affected party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (examining motions to reconsider under a similar scheme provided at 8 C.F.R. § 1003.2(b)); *see also Martinez-Lopez v. Holder*, 704 F.3d 169, 171-72 (1st Cir. 2013). Further, the reiteration of previous arguments or general allegations of error in the prior decision will not suffice. Instead, the affected party must state the specific factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision. *See Matter of O-S-G-*, 24 I&N Dec. at 60.

II. ANALYSIS

A. Motion to Reopen

A motion to reopen must state the new facts to be provided in the reopened proceeding and must be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Any new facts submitted must also be of such significance that they would likely change the outcome of the case. In this case, the Petitioner did not submit any new facts supported by documentary evidence to overcome our prior decision. As such, the motion to reopen must be denied.

B. Motion to Reconsider

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3) (detailing the requirements for a motion to reconsider).

On motion, the Petitioner cites several of our non-precedent decisions and a decision from Department of Labor's Board of Alien Labor Certification Appeals (BALCA). However, these decisions are not precedent decisions. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Moreover, as discussed below, the Petitioner has not cited to any

pertinent statutes, regulations, or case law to establish that our decision was based on an incorrect application of law or policy.

1. Labor Certification Requires 36 Months of Experience in the Job Offered

At issue on motion is whether the Beneficiary must possess 36 months of experience *in the job offered*, as indicated in Part H.6 of the labor certification or whether Part H.14, which states that "3 years architectural design experience" is required, can be viewed as an alternative to the requirements noted in Part H.6.

USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). 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." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS will not look beyond the plain language of the labor certification to determine the employer's claimed intent.

On motion, the Petitioner states that H.14 modifies H.6 and that "3 years architectural design experience" is an alternate experience requirement. The Petitioner cites several of our non-precedent decisions for the proposition that H.14 should be used to clarify job-related requirements. We agree that H.14 may be used to clarify the requirements of the job offered. But in this case, the Petitioner seeks to use H.14 to replace rather than clarify the requirements stated in H.6. The Petitioner explicitly responded "yes" to the question in H.6 of whether experience in the job offered was required and then indicated in H.6-A that 36 months of experience in the job offered was required. Part H.14, which is entitled "specific skills or other requirements," provides, among other things, that "3 years architectural design experience" is required. There is no language in H.14 stating that this requirement is an alternate experience requirement to H.6. Therefore, as we noted in our prior decision, we read the labor certification to require both 36 months of experience in the job offered and 3 years of architectural design experience.

On motion, the Petitioner states that the labor certification does not adequately provide a place for alternate experience requirements to be stated. The Petitioner states that Part H.10 of the labor certification asks whether an alternate *occupation* is acceptable but that the labor certification does not provide a place to describe where alternative job *experience* may be acceptable. The Petitioner cites *Matter of Fed. Ins. Co.*, 2008-PER-00037 *7 (BALCA Feb. 20, 2009), and states that BALCA has found the Form ETA 9089 to be inadequate in allowing employers to properly describe the minimum job requirements.

We find the points raised by the Petitioner in *Matter of Fed. Ins. Co.*, 2008-PER-00037, are

distinguishable from this matter. In that case, BALCA addressed whether an employer's omission of the *Kellogg* language[2] warranted denial of the labor certification. BALCA held that the Petitioner should not be faulted for omitting the *Kellogg* language on the Form. *Id.* Here, the issue is not whether the Petitioner omitted alternate experience requirements from the labor certification but whether it clearly indicated what the minimum and alternate requirements were. The Petitioner states that it intended "3 years architectural design experience" to be an alternate experience requirement, but the language of the labor certification does not support this fact. Part H is entitled "Job Opportunity Information" and H.3 states the job title as "Architectural Project Staff." Part H.6 asks whether experience in the job offered is required for the job. The Petitioner indicated "Yes" to this question and when asked the number of months experience required, the Petitioner stated "36 months." This demonstrates that the job offered is clearly identified in H.3, and a few lines later the Petitioner affirmatively indicated that 36 months of experience is required in this job in H.6. Had the Petitioner intended the language in H.14 to be an alternate experience requirement, it could have stated in H.14 that this was an alternate requirement to that of H.6. As it did not, the plain meaning of the labor certification indicates that the minimum requirements of the job offered are 36 months of experience in the job offered and 3 years of architectural design experience.

2. The Beneficiary's Experience with the Petitioner does not Constitute Qualifying Experience

The next issue on motion is whether the Beneficiary can use her prior experience with the Petitioner to constitute the 36 months of experience in the job offered that is required by the terms of the labor certification.

In Part J.21 of the labor certification, the Petitioner stated that the Beneficiary did not gain any of the qualifying experience with the employer in a position that is "substantially comparable" to the job offered. The regulation at 20 C.F.R. § 656.17(i)(3) states the following:

> If the alien beneficiary already is employed by the employer . . . DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
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> > (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
> > (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

[2] *Kellogg* language refers to BALCA's language that "any suitable combination of education, training or experience is acceptable." *See Francis Kellogg*, 1994-INA-465 (Feb. 2, 1998) (en banc) which has now been codified at 20 C.F.R. § 656.17(h)(4)(ii).

Therefore, the beneficiary may only rely upon experience gained with the petitioner if it is gained in a position that is not "substantially comparable" to the position offered. Under 20 C.F.R. § 656.17(i)(5)(ii), "A 'substantially comparable' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time."

The labor certification requires 36 months of experience in the job offered as architectural project staff and, as we indicated in our prior decision, if a beneficiary's qualifying experience with the petitioner is in the job offered, then 20 C.F.R. § 656.17(i)(3) bars the petitioner from counting the experience. In other words, claiming that the prior position with the employer is not "substantially comparable" to the position offered precludes experience in the prior position from being considered as experience *in the job offered.* Therefore, it is unnecessary for us to determine whether the Beneficiary's experience as a staff architect is substantially comparable to the position offered as architectural project staff. Even if the staff architect position was sufficiently distinct from the architectural project staff position, the Petitioner would not have established that the Beneficiary had the required 36 months of experience in the job offered, as is required by the labor certification.

On motion, the Petitioner states that although the Beneficiary's position as staff architect is not "substantially comparable" to the architectural project staff position, it should still be considered experience in the job offered because it includes the key duties of the position offered. The Petitioner cites *Matter of Symbioun Techs., Inc.*, 2010-PER-01422 (BALCA Oct. 24, 2011), and states that BALCA interprets Part H.6 of the labor certification to mean "experience performing the key duties of the job opportunity," which the Petitioner states is distinct from the "substantially comparable" requirement of 20 C.F.R. § 656.17(i)(3)(i). The Petitioner quotes the following portion of BALCA's decision in *Symbioun*:

> Employers are restricted in their responses by the limitations of the ETA Form 9089. Question H.6 asks specifically "is experience in the **job offered** required for the job" and includes a box to check "yes" or "no" (emphasis added). Question H.6-A then asks "if yes, number of months experience required." BALCA has interpreted the question as the Employer did in this case, that "experience in the job offered" is experience performing the key duties of the job opportunity, specifically those listed in Question H.11. *See, e.g. Duracraft of Georgia Siding & Window Company*, 2008-PER-149 (Feb. 25, 2009); *Maple Derby, Inc.*, 1989-INA-185 (May 15, 1991). Thus, Question H.6 cannot be properly used to list a requirement for experience other than in the key duties of the job offered.

Symbioun, 2010-PER-01422 *2. We note that *Symbioun* did not involve a question of whether the beneficiary's experience was "substantially comparable" to the position offered. Rather, the excerpt provided by the Petitioner states that when a petitioner requires experience in the job offered, we must evaluate experience based on the description of the job offered on the labor certification. We agree that we must look to the key duties of the job offered when analyzing whether past employment may be considered experience in the job offered. But here, the Petitioner is asking us to find that the Beneficiary's prior experience was in the job offered because it included the same key

duties, while at the time concluding that the past position was not "substantially comparable" to the job offered. According to the Petitioner's reasoning, it is unclear how a beneficiary may have experience in a position by having performed the "key duties" of the position offered while also constituting experience in a position that is not "substantially comparable." The plain meaning of "key duties" is that these are the duties constituting the majority of the duties performed, which would be more than 50% of the time.

As noted above, per 20 C.F.R. § 656.17(i)(3), a Beneficiary may only use experience with the Petitioner if the experience was in a position that was not substantially comparable to the job offered. If a petitioner claims that the prior position with the employer is not "substantially comparable" to the position offered, it precludes experience in the prior position from being considered as experience *in the job offered.*

Therefore, we find that the record does not demonstrate that the Beneficiary has the experience required by the labor certification. The Petitioner did not present precedent decisions or cite to pertinent statutes or regulations to establish that our prior decision was incorrect based on the evidence of record. As such, the motion to reconsider must be denied.

III. CONCLUSION

For the foregoing reasons, the motion to reopen and reconsider must be denied. In visa petition proceedings, the petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner did not meet that burden.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of PGNA-, PLLC*, ID# 47566 (AAO Jan. 26, 2017)