U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-W-P- INC.

DATE: JULY 30, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a motorcycle parts distributor, seeks to employ the Beneficiary as a sales representative. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. 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 two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary met the educational requirements listed on the labor certification.

On appeal, the Petitioner asserts that the Beneficiary's education and work experience are equivalent to at least a high school diploma from an accredited high school in the United States, and that it intended to accept a combination of education and experience when it listed the minimum educational requirement of "high school or equivalent" on the labor certification. Therefore, it asserts that the Beneficiary met the educational requirements listed on the labor certification.

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

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition,

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is April 25, 2017. *See* 8 C.F.R. § 204.5(d).

the foreign national applies 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.

II. THE BENEFICIARY'S EDUCATION

The Director denied the petition because the Petitioner did not establish that the Beneficiary possessed the education required by the labor certification as of the priority date. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states:

> If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(l)(4). The labor certification must require at least two years of training and/or experience. Further, the beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

In this case, the labor certification requires a "high school or equivalent" education and 24 months of experience in the job offered of sales representative or in the alternate job of salesperson. Regarding the education requirement, the labor certification states that the Beneficiary qualifies for the offered position based on a "high school diploma equivalent" from [redacted] in [redacted] Japan.

The record contains a one page credentials evaluation from e-ValReports stating that the Beneficiary "has the equivalent of a high school diploma from an unaccredited school in the United States, and has 5 ¼ years of employment experience." It further states that "for immigration purposes, [the Beneficiary] could also be considered to have the equivalent of at least a high school diploma from an accredited high school in the United States using the USCIS standard of 3 years of progressive, full-time employment experience as equivalent to 1 year of university credit." The evaluation refers to the Beneficiary's over two years of experience as a swimming instructor and over two years of experience as a salesperson, and refers to her middle school and high school education. However, it does not list any specific courses taken by the Beneficiary.

In his denial decision, the Director cited the portion of the evaluation stating that the Beneficiary has the equivalent of a high school diploma from an unaccredited school in the United States. The Director determined that a high school diploma from an unaccredited school is not the equivalent of a U.S. high school diploma or its equivalent.

On appeal, the Petitioner asserts that the Director ignored the portion of the evaluation that equated the Beneficiary's education and work experience to at least a high school diploma from an accredited

high school in the United States. It states that the Beneficiary is qualified for the offered job based on her combination of education and experience.

In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original). The Petitioner has not demonstrated that "high school or equivalent" meant that it would allow the equivalent of a U.S. high school diploma based on a combination of education and experience.

The Petitioner checked "other" at Part H.4 of the labor certification, which requests the minimum level of education required for the offered job, and it stated "high school or equivalent" at Part H.4-A, which requests the employer to specify the education required if "other" is checked at Part H.4. Part H.4-B lists the required field of study as "general education." Part H.9 indicates that the Petitioner will accept a foreign educational equivalent of a U.S. degree, and Part H.8 states that the Petitioner will not accept an alternate combination of education and experience. Thus, the plain language of the labor certification indicates the minimum educational requirement of the offered position as a U.S. high school diploma, or a foreign equivalent degree, in general education. Because "equivalent" is not defined, and because the Petitioner will not permit an alternate combination of education and experience, the labor certification indicates that "equivalent" means the foreign equivalent of a U.S. high school diploma. The Petitioner is attempting to demonstrate the Beneficiary's possession of the equivalent of a U.S. high school diploma based on a combination education and experience. But the job requirements do not allow such a combination as an equivalency.

Citing *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the Petitioner states that its intent in requiring a "high school or equivalent" degree was to accept a combination of education and experience, and that its intent should control interpretation of the requirements stated on the labor certification. In *Grace Korean*, the court reversed USCIS's denial of a skilled-worker petition where a beneficiary had the equivalent of a bachelor's degree based on a combination of education and experience. The labor certification stated the offered position's requirement of a bachelor's degree "or equivalent." *Id.* at 1176. The Petitioner argued that "or equivalent" allowed education and experience to equate to a baccalaureate degree. *Id.* at 1177. The court found that neither the Act nor Department of Homeland Security regulations require a skilled worker to have a bachelor's degree and that the petitioner drafted the position's job requirements on the labor certification "with the beneficiary in mind." *Id.* at 1179. The court therefore rejected USCIS' interpretation of the educational requirement and ordered the petition's approval.

The *Grace Korean* decision, however, does not bind us in this matter. Federal agencies need not follow published decisions of U.S. district courts in other matters, even within the courts' districts. *Matter of K-S-*, 20 I&N Dec. 715, 718-720 (BIA 1993). Moreover, the decision's facts are distinguishable from this case. As previously indicated, the labor certification in *Grace Korean* stated a minimum educational requirement of a bachelor's degree "or equivalent." *Grace Korean*, 437 F. Supp. 2d at 1176. Although stating that a "high school or equivalent" education is required, this labor certification does not permit an alternate combination of education and experience. Thus, unlike in

Grace Korean, the plain language of this labor certification clearly indicates that the offered position requires a high school degree or a foreign equivalent degree, excluding combinations of education and experience. We therefore decline to follow *Grace Korean* in this matter.

Additionally, the record does not contain any evidence showing that the Petitioner actually used its intended equivalent requirements in its labor market test.[2] The record does not contain the Petitioner's recruitment for the position, which may have provided evidence of the Petitioner's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the DOL while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. Such intent may have been illustrated through correspondence with DOL, advertisements, a posting notice, results of recruitment, or other forms of evidence relevant and probative to illustrating the Petitioner's intent about the actual minimum requirements of the proffered position and that those minimum requirements were clear to potential qualified candidates during the labor market test. A petitioner bears the burden of establishing eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). A petitioner must establish that it meets each eligibility requirement by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. 369, 375-76 (AAO 2010). The Petitioner has not met its burden in this case.

Even if we accept the Petitioner's assertion that the labor certification permits a combination of education and work experience to equal at least a high school diploma from an accredited high school in the United States, the evidence is not sufficient to establish that the Beneficiary's education and work experience are equivalent to a high school diploma from an accredited high school in the United States. The Beneficiary attended an unaccredited high school, [redacted] in [redacted] Japan, from April 1999 to June 2004. A transcript lists her courses, such as English language, Japanese language, writing and composition, debate, theater history, marketing, entertainment business, musical theater performance, and health education. The record does not establish that students are credited with graduation from high school and/or are eligible to enter college after graduating from [redacted]

The evaluation equates three years of the Beneficiary's experience to one year of U.S. university credit, but then uses that equivalency to change the Beneficiary's high school diploma from an unaccredited diploma to an accredited one. The three-for-one formula cited by the evaluation applies only to H-1B nonimmigrant visa petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (describing a U.S. baccalaureate equivalency for H-1B purposes). Further, the evaluation does not (a) explain the difference between unaccredited and accredited high schools in Japan; (b) equate the courses that the Beneficiary took at [redacted] to U.S. high school courses; (c) explain

[2] The DOL has provided the following guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Admin., to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Admin., Interpretation of "Equivalent Degree," 2 (June 13, 1994). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Admin., to Joseph Thomas, INS (Oct. 27, 1992).

how the Beneficiary's experience as a swimming instructor and salesperson equates to any specific university credit(s); or (d) detail how her 5 ¼ years of experience relates to high school credits or high school accreditation. Because of the deficiencies in the evaluation, it is also not clear whether she is attempting to use her years of work experience as a salesperson to qualify her for both the educational and experience requirements of the labor certification. USCIS may reject or give lesser evidentiary weight to credential evaluations inconsistent with the record or "in any way questionable." *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). We decline to accept to evaluation from e-ValReports as credible evidence of the Beneficiary's education based on the deficiencies set forth above. The record therefore does not establish the Beneficiary's possession of the foreign equivalent of a U.S. high school diploma.

Accordingly, the Petitioner has not established that the Beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date.

III. THE BENEFICIARY'S EXPERIENCE

We note that the Beneficiary stated on an E-2 nonimmigrant visa application submitted in September 2012 that she was not previously employed. However, on the labor certification in this case, she claimed employment as a swimming instructor in Japan from September 1, 2004, to May 1, 2007, and as a sales representative in Japan from July 1, 2007, to January 17, 2010. The Petitioner must resolve this inconsistency with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* However, because a petitioner must be afforded an opportunity to review all derogatory information before a decision is rendered, the derogatory information will not form a basis for dismissal of this appeal. *See, e.g.*, 8 C.F.R. § 103.2(b)(16)(i). In any future filings, the Petitioner must resolve the inconsistency with independent, object evidence.

IV. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of E-W-P- Inc.*, ID# 05378125 (AAO July 30, 2019)