U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32326123

Date: SEP. 03, 2024

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Workers (Professional)

The Petitioner, an e-commerce business specializing in musical instruments and supplies, seeks to employ the Beneficiary as an "IT project manager." It requests classification of the Beneficiary as a professional under the third preference immigrant classification. See Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding the record did not establish that the Beneficiary was qualified for the offered position because she did not meet the experience requirements stated on the labor certification. The Petitioner later filed an appeal that we dismissed. The matter is now before us on a motion to reopen.

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). Upon review, we will dismiss the motion.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

In denying the Petitioner's prior appeal, we agreed with the Director's determination that the Petitioner did not establish that the Beneficiary met the minimum experience requirement stated on the labor certification, specifically, based on her employment as an intern/junior business systems analyst with the company from June 2015 to June 2017. We pointed to the fact that the Petitioner did not indicate on the labor certification that an alternate occupation was acceptable to fulfill the minimum experience requirement. We indicated that the Petitioner also claimed the Beneficiary gained two years of

experience "in the job offered" based on her employment in a position not substantially comparable to the job offered.[1]

We further disagreed with the Petitioner's assertion that we should defer to the Department of Labor's (DOL) certification of the labor certification as evidence that the Beneficiary met the minimum requirements for the position, reasoning that U.S. Citizenship and Immigration Services (USCIS) maintains authority to determine whether a beneficiary and the offered position meet the requirements of the requested employment-based preference category and whether a beneficiary meets the minimum requirements of the offered position based on the terms of the labor certification.[2] In addition, we further disagreed with the Petitioner's assertion that since USCIS approved similar petitions on behalf of other beneficiaries relying on experience gained as interns, we should also approve the current petition.[3]

We also agreed with the Director's conclusion that the Beneficiary's 24 months of experience as an intern did not meet the stated minimum requirement of 24 months of experience in the job offered as an IT project manager. We noted that the Petitioner stated that "[h]er position as an Intern . . . was not substantially comparable to the proffered position of IT Project Manager" and that the two positions were "substantially different" in scope. In addition, we emphasized that the Petitioner stated that all the Beneficiary's duties as an intern were performed under direct supervision, unlike the offered position of IT project manager. We concluded that the Petitioner did not support its claim that the two positions were simultaneously "not substantially comparable," yet similar enough to be within the same occupation.

In support of this motion to reopen, the Petitioner submits a new version of the DOL ETA-9089, Application for Permanent Employment Certification. The Petitioner emphasizes that the new version of the labor certification introduced by the DOL removed questions H.10. and 10-A specific to whether or not experience in an alternate occupation would be acceptable for a position. The Petitioner contends that these questions were removed since they were "unhelpful" or "at worst, confused and further complicated the process." The Petitioner asserts that the removal of these questions from the new version of the labor certification indicates that they were not critical to the adjudication of immigrant petitions by USCIS. The Petitioner further states that the job duties of the position control, not the job title of intern/junior business systems analyst. The Petitioner points to a previously submitted letter from July 2022, asserting it demonstrates that the Beneficiary's position as an intern/junior business systems analyst qualified her to perform the job duties of the offered position.

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[1] We reasoned that if a Petitioner's answer to section J.21 of the labor certification is "no," then experience with the employer may be used by a beneficiary to qualify for the proffered position, but only if: (1) the prior position was not substantially comparable to the offer position, and (2) the terms of the labor certification at section H.10 provide that applicants can qualify through an alternate occupation. Experience "in the job offered" means experience performing an offered position's key duties as stated on a labor certification. *E.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *3 (BALCA Oct. 24, 2011) (citations omitted).

[2] *See, e.g., Madany v. Smith*, 696 F.2d at 1012 (noting that all matters relating to preference classification eligibility not expressly delegated to DOL remain with the authority of the former Immigration and Naturalization Service).

[3] We indicated that we were not required to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

We emphasize that the scope of our motion is limited to "the prior decision" and "the latest decision in the proceeding." 8 C.F.R. § 103.5(a)(1)(i), (ii). Therefore, we will only consider new evidence to the extent that it pertains to our latest decision dismissing the Petitioner's appeal. Here, the Petitioner has not provided new facts and evidence to establish that we erred in dismissing the appeal.

For instance, although the DOL issued a new version of the labor certification in 2023, this is not relevant to the Beneficiary's eligibility for the benefit sought when the petition was filed in July 2022. The affected party has the burden of proof to establish eligibility for the requested benefit at the time of filing the benefit request and continuing until the final adjudication. 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971) (providing that "Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts."). Further, we decline to speculate as to why DOL modified the questions on a new version of the labor certification. Our review is limited to the labor certification in this record, and it clearly indicates, as discussed in our prior decision, that experience in alternate occupations was not acceptable to meet the minimum experience requirement for the offered position.

In addition, as indicated in our prior decision, the Petitioner acknowledges that the Beneficiary's prior position as intern was not substantially comparable to the offered position of IT project manager. In fact, the letter the Petitioner resubmits on appeal states that the Beneficiary's "position as Intern (06/15/2015 to 06/17/2017) was not substantially comparable to the proffered position of IT Project Manager." The provided letter further points to the duties of the intern position and indicates that it was "substantially different from her IT Project Manager position." Further, the discussed letter already submitted and considered on the record does not represent new evidence to support a motion to reopen. Based on the foregoing, the Petitioner has not submitted new facts and evidence to establish that we erred in dismissing the prior appeal.

Therefore, since the Petitioner has not established new facts that would warrant reopening of the proceeding, we have no basis to reopen our prior decision. We will not re-adjudicate the petition anew and, therefore, the underlying petition remains denied.

ORDER: The motion to reopen is dismissed.