U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13575402

Date: SEPT. 30, 2021

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as an area immunoassay and clinical chemistry specialist. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. 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 Texas Service Center denied the petition, concluding that the record did not establish that the Beneficiary met the requirements of the labor certification. We dismissed a subsequent appeal. The matter is now before us on a motion to reopen and a motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. §1361. Upon review, we will dismiss the motion to reopen and motion to reconsider.

I. MOTION REQUIREMENTS

A petitioner must meet the formal filing requirements of a motion and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1). A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2).

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

II. ANALYSIS

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date[1] 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). Here, the accompanying labor certification states the primary, minimum requirements of the offered position of area immunoassay and clinical chemistry specialist as a U.S. bachelor's degree or a foreign equivalent degree in computer science and engineering, science, engineering, or a closely related field (Parts H.4, H.4-B, H.7, H.7-A, and H.9), and 24 months of experience as an immunoassay and clinical chemistry hardware specialist (Parts H.10, H.10-A, and H.10-B). At Part H.8, the labor certification indicates that no alternate combination of education and experience is acceptable. Part H.14 of the labor certification ("Specific skills or other requirements") states, in part: "Will accept educational equivalency evaluation prepared by qualified evaluation service or in accordance with 8 CFR § 214.2(h)(4)(iii)(D)."[2] The Petitioner represented on Part J of the labor certification that the Beneficiary's highest level of education relevant to the job opportunity is a bachelor's degree in computer science and engineering from [redacted] in [redacted] Brazil, completed in 2004.[3]

In his decision denying the petition, the Director interpreted the job offer portion of the labor certification as requiring a bachelor's degree and 24 months of experience and found that the Beneficiary did not meet the educational requirement because he did not have the foreign equivalent of a U.S. bachelor's degree. In our appeal decision, we determined that the plain language of the labor certification does not support the Petitioner's claimed intent to accept less than a U.S. bachelor's or foreign equivalent degree to meet the minimum educational requirement for the proffered position.[4] We agreed with the Director that the Beneficiary does not qualify for the job offered because he does not meet the minimum requirements of the labor certification.

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[1] The priority date of the petition is September 7, 2018.

[2] The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D), which is applicable to H-1B nonimmigrant visas, provides several options for equivalency to completion of a college degree, including certain credentials evaluations; results of college-level equivalency examinations or special credit programs; certification or registration from certain professional associations; and a determination that the equivalent of a degree has been acquired through a combination of education, specialized training, and/or work experience.

[3] An evaluation of the Beneficiary's education and experience in the record indicates that the Beneficiary's diploma from [redacted] in Brazil is equivalent to two and one-half years of undergraduate coursework in computer science and engineering at a regionally accredited university, and that the combination of this education and his experience is equivalent to a bachelor's degree in computer science and engineering from a regionally accredited undergraduate-level program or institution in the United States.

[4] In order to determine the minimum requirements of a proffered position, we must examine "the language of the labor certification job requirements." *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Co. v. Smith*, 595 F.Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the labor certification application form. *Id.* at 834.

A. Motion to Reopen

On motion to reopen, the Petitioner submits its recruitment for the position, including: the job order placed with the Texas Workforce Commission; newspaper advertisements; notice of filing; advertisement placed on a job search website; employee referral program advertisement; and copy of its recruitment report. Based on its recruitment, it asserts that its acceptance of an educational equivalency was made known to interested candidates.[5] It further asserts that the petition should have been approved because the Petitioner was willing to accept the equivalent of a bachelor's degree and 24 months of experience through a combination of education and experience.

The Petitioner's recruitment indicates that applicants were notified that the Petitioner would accept an educational equivalency evaluation prepared by qualified evaluation service or in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D). However, according to the record, nothing alerted the U.S. Department of Labor (DOL) that the Beneficiary sought to rely on an alternate combination of education and experience. The Petitioner indicated that no alternate combination of education and experience was acceptable at Part H.8 of the labor certification. Part H.8 is the proper location on the labor certification to identify any acceptable alternate combinations of education and experience. Part H.8 of the labor certification in this case does not permit an alternate combination of education and experience.

Further, the labor certification does not indicate in Part J.11 that the Beneficiary had an "other" alternate combination of education, but instead attests that the Beneficiary met the Part H.4 primary educational requirement of a U.S. bachelor's degree or a foreign equivalent degree. The Petitioner additionally marked "N/A" to Question J.19, "Does the alien possess the alternate combination of education and experience as indicated in H.8?" On motion, the Petitioner asserts that the DOL reviewed the labor certification and made a decision not to audit the application despite the inclusion of the Part H.14 language. However, the DOL was unable to make a proper investigation of the facts when determining certification because the Petitioner shut off a line of relevant inquiry. As the labor certification was completed, DOL was not informed that the Beneficiary sought to rely on an alternate combination of education and experience.

Additionally, as we noted in our appeal decision, the labor certification states that the job requirements are normal for the occupation. However, if the Part H.14 equivalency is accepted, the potential years of combined experience to meet the educational equivalency would exceed the standard vocational preparation for the position and render this response incorrect. *See* O*Net Online, https://www.onetonline.org/link/summary/17-2061.00 (last visited Sept. 30, 2021). The DOL would not have had an opportunity to assess this.

In sum, reviewing the labor certification as a whole, the Petitioner has not demonstrated that the labor certification requires less than a U.S. bachelor's or foreign equivalent degree. The Beneficiary does not possess such a degree. Thus, the Beneficiary does not qualify for the offered job because he does not meet the minimum requirements of the labor certification. While the Petitioner's recruitment submitted on motion indicates that applicants were notified that the Petitioner would accept an educational equivalency, nothing alerted DOL that the Beneficiary sought to rely on an alternate

[5] One applicant applied but was not considered eligible because they lacked the required experience.

combination of education and experience, preventing further inquiry by the DOL. We will therefore dismiss the motion to reopen.

B. Motion to Reconsider

On motion to reconsider, the Petitioner asserts that the Beneficiary's education and experience meet the minimum requirements of the offered position and the skilled worker classification, and that USCIS cannot attempt to adjudicate a labor certification on behalf of the DOL. The foreign labor certification process is designed to confirm that there are insufficient U.S. workers who are able, willing, qualified, and available to perform the offered position, and that the employment of the beneficiary will not adversely affect similarly employed U.S. workers. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). The Act requires USCIS to determine eligibility for the visa classification requested. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F).[6] Certain classifications require a labor certification to establish eligibility. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 204.5(l)(3)(i). Thus, USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See id.* USCIS is required to approve an employment-based immigrant visa petition only where it is determined that the facts stated in the petition, which incorporates the labor certification, are true and the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Here, we have not attempted to adjudicate the labor certification on behalf of the DOL. Instead we have investigated the facts of the petition and the required labor certification and determined that the Beneficiary is not eligible for the benefit sought.

On motion, the Petitioner cites the same unpublished 2007 AAO decision that it submitted on appeal. As we noted in our prior decision, this decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. We note that unlike the Form ETA 750 that was reviewed in the submitted non-precedent AAO case, the ETA Form 9089, Application for Permanent Employment Certification, specifically asks the employer at Part H.8 whether an alternate combination of education and experience is acceptable. The Petitioner in this case answered "No."

The Petitioner has not established that our decision was based on an incorrect application of law or policy based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). Therefore, we will dismiss the motion to reconsider.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

[6] It is also the responsibility of USCIS to determine if the beneficiary qualifies for the offered position. *See Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).