U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20684612

Date: JUL. 18, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a specialty painter under the third-preference, immigrant visa category for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers, concluding that the position's job requirements do not support the requested immigrant visa classification since the offered position requires less than two years of training or experience. The Director also concluded that the Petitioner could not amend the petition to change the requested classification from skilled worker to any other worker. On appeal the Petitioner asserts that it made a clerical error in its classification request on the petition and should be allowed to change the request.

The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we dismiss the appeal.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). Second, an employer must submit an approved DOL ETA Form 9089, Application for Permanent Employment Certification (labor certification) with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l). Finally, if USCIS approves a petition, a noncitizen beneficiary may apply 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. ANALYSIS

The Petitioner filed the Form I-140 on July 18, 2019, and it checked the box at Part 2.1.f indicating that the petition was being filed for a skilled worker. The petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), with a priority date of May 15, 2019. Section H of the labor certification specifies the education, training, and experience required to qualify for the job offered as follows:

> 4. Education: minimum level required: None
> 5. Is training required in the job opportunity? No
> 6. Is experience in the job offered required for the job? Yes
> 6-A. If Yes, number of months experience required: 12
> 8. Is there an alternate combination of education and experience that is acceptable? No
> 14. Specific skill or other requirements – Must have at least one year experience in specialty painting (customized faux and other specialty finishes, color matching).

Thus, the labor certification states that the offered position has no minimum education requirement, and that 12 months of work experience in the job offered or in specialty painting are required. As indicated, the minimum requirements for the position are less than two years of training or experience as required for the skilled worker classification. A position for a skilled worker must require at least two years of training or experience. *See* Section 203(b)(3)(A)(i) of the Act.

In June 2021, the Director issued a notice of intent to deny (NOID) alleging, in part, that the position is ineligible for classification as a skilled worker because its minimum requirements are less than two years of training of experience. In response to the NOID, the Petitioner stated that the skilled worker category was "selected inadvertently and in error," and the any other worker category should have been selected instead. The Petitioner also submitted an amended Form I-140 in which the Petitioner checked the box at Part 2.1.g indicating that the petition was filed for any other worker (requiring less than two years of training of experience.) Ultimately, the Director found the position ineligible for classification as a skilled worker since the position requires less than two years of training or experience, and the Petitioner could not amend the petition to change the requested classification. The Director cited to *Matter of Izummi*, concluding that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The Petitioner appeals the Director's decision and asserts that it made a clerical error in its classification request on the petition and should be allowed to change the requested eligibility category from skilled worker to any other worker. According to the Petitioner, the present case is clearly distinguishable from *Matter of Izummi* because the Petitioner did not seek to establish eligibility based on a new set of facts after filing its I-140, but instead merely sought to rectify an error in the initial I-140 filing. The Petitioner also contends that the Beneficiary met the minimum educational requirements of the labor certification.

Specifically, in this case, the evidence in the record does not establish that the Petitioner intended to request the skilled worker classification at the time the petition was filed and simply made a clerical error. The Form I-140 indicated skilled worker, and the letter of support submitted with the petition

indicated that the Petitioner was filing for the EB-3, skilled workers category. Not until responding to the Director's NOID did the Petitioner first request that it be allowed to change the classification request from skilled worker to any other worker.

Further, we are not able to change the requested preference classification on appeal because the Director has already issued a decision on the petition. At the USCIS website under petition filing and processing procedures for Form I-140, the agency provides instructions on how to correct the visa category selected in Part 2 of Form I-140. The guidance states that the Petitioner must review for accuracy the receipt notice that indicates the visa category requested on Part 2 of Form I-140. If the category is not correct, the Petitioner must immediately call the USCIS contact center to request a change in the visa classification before making a decision on the form. The instructions also indicate that if the Petitioner requests a change in visa classification to correct a clerical error, USCIS will make the final determination about whether to change the visa classification based on everything in the case. Finally, the instructions states that a visa category cannot be changed if a decision has been made on the I-140. *See* USCIS website, Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Workers, https://www.uscis.gov/forms/all-forms/petition-filing-and-processing-procedures-for-form-i-140-immigrant-petition-for-alien-workers#Requesting. There is no indication the Petitioner followed any of these steps. In any event, we are not able to change the requested preference classification on appeal because the Director has already issued a decision on the petition.

III. CONCLUSION

The position's job requirements do not support the requested immigrant visa classification and a change to the requested preference classification cannot be made on appeal. We will therefore dismiss the appeal.

ORDER: The appeal is dismissed.