U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20632704

Date: JUL. 19, 2022

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 the record did not establish that the Beneficiary met the requirements of the labor certification. The Petitioner later filed an appeal that we dismissed. The Petitioner then filed a motion to reopen and a motion to reconsider that we also dismissed. The matter is now before us again on 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 reconsider.

I. MOTION REQUIREMENTS

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).

II. ANALYSIS

A beneficiary must meet all 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 stated the primary, minimum requirements of the offered position of area immunoassay and clinical chemistry specialist is 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

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

H.10, H.10-A, and H.10-B). At Part H.8, the labor certification indicated that no alternate combination of education and experience is acceptable. Part H.14 of the labor certification ("Specific skills or other requirements") stated, in part: "[the Petitioner] 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] University in [redacted], Brazil, completed in 2004.[3]

In our prior decision denying the motions, we acknowledged the Petitioner had provided supporting evidence on motion indicating that during its recruitment for the position, applicants were notified it would accept an educational equivalency evaluation prepared by qualified evaluation service or experience in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D). However, we stated that the evidence did not reflect the U.S. Department of Labor (DOL) was notified that the Petitioner sought to rely on an alternate combination of education and experience. We also noted the Petitioner indicated that no alternate combination of education and experience was acceptable at Part H.8 of the labor certification, the proper location to identify any acceptable alternate combinations of education and experience. As such, we concluded, similar to our conclusion in our prior appeal decision, that Part H.8 of the labor certification did not permit an alternate combination of education and experience.

In addition, regarding the labor certification, we stated that the job requirements were normal for the occupation, but if the Part H.14 equivalency were accepted, the potential years of combined experience to meet the educational equivalency would exceed the standard vocational preparation for the position, render the response incorrect, and that DOL did not have had an opportunity to assess this. Therefore, we dismissed the motion to reopen, concluding that the labor certification, when viewed as a whole, did not require less than a U.S. bachelor's or foreign equivalent degree, and the Beneficiary does not possess such a degree.

Further, in dismissing the motion to reconsider, we addressed the Petitioner's assertion that we improperly adjudicated the labor certification, emphasizing that we had investigated the facts of the petition and the required labor certification, and determined that the Beneficiary was not eligible for the benefit sought, consistent with our regulatory authority. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). We also discussed the Petitioner's citation to an unpublished 2007 AAO decision, indicating that such an unpublished decision did not bind us in future adjudications. *See* 8 C.F.R. § 103.3(c).

In support of this motion, the Petitioner contends that in our prior decision we only reiterated the language of the Director's decision and did not properly consider the additional supporting

[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] University 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.

documentation submitted on motion. The Petitioner also asserts that by requiring it to establish that the Beneficiary could only qualify for the position by meeting the minimum educational requirements specified in Part H.8. of the labor certification, we applied a higher standard of proof, requiring his qualifications be demonstrated "beyond a reasonable doubt." In addition, the Petitioner states that we supplemented the skilled worker requirements with additional qualifications not specified in the applicable regulations. The Petitioner again points to 8 C.F.R. § 214.2(h)(4)(iii)(D) and asserts that the evaluations provided on the record, and the Beneficiary's experience, are sufficient to establish that he has the equivalent of the U.S. bachelor's degree required for the position.

The Petitioner also states that we overlooked Part H.14 if the labor certification, within which it contends it clearly indicated that a combination of experience and education would be sufficient for the position. Specifically, the Petitioner states that the Beneficiary's extensive experience in his field accounts for the 1.5 years of bachelor's education he lacks to meet the minimum education requirement. The Petitioner again points to a 2007 non-precedent decision issued by us and contends this demonstrates a petitioner may establish that a combination of education and experience is sufficient to satisfy the minimum education requirements for the position if it provides evidence that this requirement was disclosed in advertisements for the position.

The Petitioner has not established that our prior 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). For instance, the Petitioner states that we only reiterated the language of the Director's decision and did not sufficiently evaluate the additional evidence it submitted in support of the prior motion to reopen. We disagree, as we directly discussed the additional evidence provided in support of the prior motion to reopen in our prior decision. For example, we evaluated its advertisements for the position submitted on motion.

However, this assertion on the part of the Petitioner ignores the central part of our analysis set forth in the prior decision; namely, nothing alerted the DOL that the Beneficiary sought to rely on an alternate combination of education and experience. As we have discussed, the Petitioner indicated that no alternate combination of education and experience was acceptable at Part H.8 of the labor certification, the proper location on the labor certification to identify any acceptable alternate combinations of education and experience. Similarly, we also noted that the labor certification did not indicate in Part J.11 that the Beneficiary had an "other" alternate combination of education and experience, but instead the Petitioner attested that he met the Part H.4 primary educational requirement of a U.S. bachelor's degree or a foreign equivalent degree. Likewise, 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?" Therefore, as we previously stated, despite the Petitioner's statements in Part H.14 asserting that some combination of education and experience would be acceptable, the face of the labor certification clearly reflects that only a U.S. bachelor's degree or its foreign equivalent would be acceptable for the position.

U.S. Citizenship and Immigration Services (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, as in our prior decisions, 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, since he does not have the required U.S. bachelor's degree or foreign equivalent. We do not agree that this represents us adding additional regulatory requirements to a skilled worker position, or modifying the standard of proof in this case, as the Petitioner contends.[4]

The Petitioner also again points to 8 C.F.R. § 214.2(h)(4)(iii)(D) and asserts that the evaluations provided on the record, and the Beneficiary's experience, are sufficient to establish that he has the equivalent of the U.S. bachelor's degree required for the position. However, as previously noted, this regulation is only applicable to H-1B nonimmigrant visas and not relevant to the skilled worker category. This regulation does not relieve the Petitioner from demonstrating that the Beneficiary is qualified under the specific requirements set forth in the labor certification, which as we have discussed, explicitly require a U.S. bachelor's degree or foreign equivalent. As we have noted, nothing in the record demonstrates that DOL audited the labor certification and accepted that the Petitioner expressed an educational equivalency.

On appeal, the Petitioner again emphasizes a non-precedent AAO decision from 2007 analyzing the requirements of a Form ETA 750, Application for Alien Employment Certification, in conjunction with the petitioner's posting and recruitment for the position. However, as we have noted twice previously, 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. Further, again, unlike the Form ETA 750 that was reviewed in the submitted non-precedent AAO case, the ETA Form 9089, Application for Permanent Employment Certification, in this matter specifically asks the employer at Part H.8 whether an alternate combination of education and experience is acceptable. As noted, the Petitioner answered "No" to this question.

Similarly, the Petitioner also again points to a document entitled "NSC Liaison Committee I-140 Practice Tips and Updates" dated February 2007, representing notes from American Immigration Lawyers Association meetings and teleconferences with staff from the USCIS Nebraska Service Center. According to this document submitted, the Nebraska Service Center stated that "if petitioners submit recruitment documentation that establishes that the petitioner was willing to accept U.S. applicants with less than a 4-year bachelor's degree, the position and the beneficiary may be evaluated under the third preference skilled worker category." However, unpublished agency decisions and legal opinions are not binding, even when they are published in private publications or widely circulated. *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001). Here, the terms of the labor certification were clear, and required a U.S. bachelor's degree or foreign equivalent, which the Petitioner acknowledges that the Beneficiary does not have.

Therefore, the Petitioner has not demonstrated that our prior decision to dismiss its motions was an incorrect application of law or policy based on the evidence in the record of proceedings at the time of that decision. 8 C.F.R. § 103.5(a)(3). In particular, other than 8 C.F.R. § 214.2(h)(4)(iii)(D) discussed above, the Petitioner does not cite to any pertinent precedent decision, statute, regulation,

[4] A petitioner must establish that it meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. 369, 375-76 (AAO 2010). To determine whether a petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989).

binding federal court decision, USCIS policy statement, or other applicable authority to establish that the prior decision was defective in some regard. As such, we will dismiss the motion to reconsider.

ORDER: The motion to reconsider is dismissed.