U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10357007

Date: OCT. 1, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a technical analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the labor certification supports the requested classification of advanced degree professional. The matter is now before us on appeal.

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 *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) of the Act, 8 U.S.C. § 1182(a)(5). 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 id*. 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, 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is January 22, 2019. *See* 8 C.F.R. § 204.5(d).

II. THE ADVANCED DEGREE CLASSIFICATION

The Director concluded that the record did not establish that the labor certification supports the requested classification of advanced degree professional. Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the term "advanced degree" as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

To determine a position's minimum requirements, USCIS must examine the job offer portion of a labor certification. 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). In this case, the labor certification states at Part H.4 that the minimum educational requirement is a U.S. master's degree or a foreign equivalent degree in computer science, engineering, or a related technical field;[2] however, part H.14 of the labor certification ("Specific skills or other requirements") states, in part: "Employer will accept Bachelor's degree in Computer Science, Engineering, or a related technical field."[3] The record contains the prevailing wage determination which indicates that the minimum educational requirement is a master's degree; however, this conflicts with the language at Part H.14 of the labor certification which indicates that the minimum educational requirement for the offered position is a bachelor's degree.[4] The Director determined that the language at Part H.14 indicates that the minimum requirement for the offered position is a bachelor's degree. Because an individual can qualify for the offered position with less than a degree above a baccalaureate, or less than a baccalaureate followed by five years of progressive experience in the specialty, he found that the petition does not qualify for advanced degree professional classification.

The Petitioner asserts on appeal that DOL certified the labor certification following an audit and that it clarified to DOL that the minimum educational requirement for the offered job is a master's degree.[5]

---

[2] The Beneficiary possesses a U.S.-awarded master of science degree in information systems.

[3] Part H.14 does not include the required five years of progressive experience in the specialty to meet the definition of advanced degree. 8 C.F.R. § 204.5(k)(2).

[4] The Petitioner must resolve discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[5] As previously noted, DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. *See* section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). USCIS determines whether

The record contains the Petitioner's audit response, including its recruitment report.[6] The report states that the minimum educational requirement for the offered job is a master's degree. The recruitment reports details the Petitioner's recruitment for the offered job, but the record does not contain copies of the Petitioner's recruitment, including print advertisements in *The Washington Post*, print advertisements in the *Daily News*, the job order, the internal posting notice, a posting in the external job search website www.jobvertise.com, and an ad in the professional journal *IEEE Computer Society*. Thus, although the Petitioner states its intent to require a master's degree for the offered job, the record is unclear whether U.S. applicants were aware that a U.S. master's degree or foreign equivalent was required to qualify for the offered job. The Petitioner has not established by a preponderance of the evidence that the minimum educational requirement is a master's degree.

On appeal, the Petitioner further asserts that the Director's denial "is ultra vires and beyond the scope of [USCIS'] review of I-140 petitions based on the clear language of the regulations and supporting Adjudicators' Field Manual provisions."[7] It states that under 8 C.F.R. § 204.5(k), USCIS is required to review the position's job requirements to ensure that the job requires a professional holding an advanced degree, and to ensure that the Beneficiary possess the minimum requirements for the offered position. Here, the Director determined that the labor certification does not support the requested classification of advanced degree professional because it does not require a professional holding an advanced degree. As noted by the Petitioner, this determination is clearly within the scope of USCIS's review. Similarly, AFM chapter 22.2 states that "[o]nly USCIS has the authority to determine qualifications for nonimmigrant and immigrant classifications." *Adjudicator's Field Manual* 22.2(b)(3)(E), https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm22-external.pdf. The Director's denial is not ultra vires and his determination is within the scope of USCIS' review.

On appeal, the Petitioner also asserts that USCIS violated the Petitioner's right to due process by failing to adequately clarify specific evidence it was asking for in the request for evidence (RFE), and by failing to adequately review the information submitted in response to the RFE. Although the Petitioner argues that its rights to procedural due process were violated, it has not shown that any violation of the regulations resulted in "substantial prejudice." *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The Petitioner has fallen short of meeting this standard. An RFE is, by nature, the result of a preliminary review of the record rather than an exhaustive evaluation thereof, and the issuance of an RFE is discretionary under 8 C.F.R. § 103.2(b)(8). Because the Director was not required to issue an RFE at all, the Director did not violate the Petitioner's right to due process by failing to incorporate a comprehensive list of evidence that might clarify the

---

a beneficiary is entitled to the job and specific visa classification after applying the appropriate statutory requirements. *See Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d at 1012-1013.

[6] The recruitment report shows that the Petitioner rejected each of the four applicants, in part, because they did not have a master's degree in computer science, engineering, or a related technical field.

[7] The USCIS Policy Manual is the agency's centralized online repository for immigration policies. The USCIS Policy Manual will replace the USCIS Adjudicator's Field Manual (AFM), the USCIS Immigration Policy Memoranda site, and other policy repositories. *See* USCIS Policy Manual, https://www.uscis.gov/policy-manual (last visited Aug. 31, 2020).

requirements of the petition.[8] Further, we have considered the labor certification as a whole and reviewed all of the evidence in the record and, for the reasons discussed above, we conclude that the record is insufficient to establish that the petition qualifies for advanced degree professional classification. *See Pierre v. U.S. Att'y Gen.*, 879 F.3d 1241, 2018 WL 456205, *8 (11th Cir. 2018) (requiring a successful challenge to show that a due process deprivation caused "substantial prejudice"). We therefore reject the Petitioner's due process claim.

The Petitioner further cites USCIS Policy Memorandum PM-602-0163[9] and states that the RFE violated 8 C.F.R. § 103.2(b)(16)(i).[10] We disagree. The regulation requires only that the Petitioner be "advised of" the derogatory information relied on in the adverse decision. *See Hassan v. Chertoff*, 593 F.3d 785, 787 (9th Cir. 2010) (concluding 8 C.F.R. § 103.2(b)(16)(i) only requires the government to make a petitioner "aware" of the derogatory information used against him or her); *Ogbolumani v. Napolitano*, 557 F.3d 729, 735 (7th Cir. 2009) (explaining that 8 C.F.R. § 103.2(b)(l6)(i) does not require USCIS to exhaustively list all information found regarding marriage fraud and notice of intent to deny gave plaintiffs sufficient notice and opportunity to respond to derogatory information); *Mangwiro v. Johnson*, 554 Fed. App'x 255, 261 (5th Cir. 2014) (concluding 8 C.F.R. § 103.2(b)(l6)(i) "does not require users to provide documentary evidence of the [derogatory] information, but only sufficient information to allow the petitioners to rebut the allegations"); *Diaz v. USCIS*, 499 Fed. App'x 853, 855-56 (11th Cir. 2012) (concluding 8 C.F.R. § 103.2(b)(16)(i) "only require[s] that a petitioner be advised of the derogatory information that will be used to deny the petition and be given the opportunity to respond"). In the RFE, the Director notified the Petitioner of the discrepancy between Part H.14 of the labor certification and the requirements of the second preference classification of advanced degree professional, and he gave the Petitioner the opportunity to clarify the job requirements.[11] We therefore reject the Petitioner's claim that the RFE violated 8 C.F.R. § 103.2(b)(16)(i).

---

[8] In its response to the RFE and on appeal, the Petitioner's counsel states that the discrepancy on the labor certification was due to clerical error. However, it did not detail the circumstances of the error, nor did it submit corroborating evidence of the nature of the error. Moreover, we note that pursuant to Section N of the labor certification, the employer takes full responsibility for the accuracy of the information contained therein. The DOL stated in the preamble to the *Proposed Rule. Reducing Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity. Permanent Labor Certification Program*. 71 Fed. Reg. 7655 (Feb. 13, 2006):

> The online application system is designed to allow users to proofread and revise before submitting the application, and the Department expects and assumes that users will do so. Moreover, in signing the application the employer declares under penalty of perjury that he or she has read the application and the submitted information is true and accurate to the best of his or her knowledge. In the event of an inadvertent error or any other need to refile, an employer can withdraw an application, make the corrections and file again immediately.

[9] *See* USCIS Policy Memorandum PM-602-0163, *Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)* (July 13, 2018), http://www.uscis.gov/legal-resources/policy-memoranda. This policy memorandum provides guidance to USCIS adjudicators regarding the discretion to deny a petition without first issuing an RFE or notice of intent to deny if initial evidence is not submitted or if the evidence in the record does not establish eligibility.

[10] This regulation generally prohibits USCIS from making an adverse finding on the basis of derogatory information of which a petitioner is unaware.

[11] The Petitioner also had the opportunity to clarify the job requirements on appeal.

Reviewing the labor certification as a whole and the totality of the evidence in the record, we conclude that offered position does not require an advanced degree because its minimum educational requirement is a U.S. bachelor's or foreign equivalent degree. *See* 8 C.F.R. § 204.5(k)(2). Thus, the petition cannot be approved for a member of the professions holding an advanced degree under section 203(b)(2) of the Act.[12]

ORDER: The appeal is dismissed.

[12] We note that the Petitioner filed a subsequent Form I-140 for the Beneficiary under the third preference professional classification. That petition was approved on December 26, 2019.