U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9319474

Date: JULY 7, 2020

Appeal of Texas Service Center 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. 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)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). 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* section 212(a)(5)(A)(i)(I)-(II) of the Act. 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 September 7, 2018. *See* 8 C.F.R. § 204.5(d).

II. THE REQUIREMENTS OF THE OFFERED POSITION

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date 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, and 24 months of experience as an immunoassay and clinical chemistry hardware specialist. 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, however, 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. The record contains the Beneficiary's diploma in hardware support and analysis from [redacted] University and transcripts, with English translations. The Petitioner did not indicate in Part J.11 that the Beneficiary had an "other" alternate combination of education, but instead attested that he met the Part H.4 education requirement.

Part K of the labor certification states that the Beneficiary has over two years of experience in the offered position with the Petitioner in [redacted] Texas, and over 16 years of experience as an immunoassay and clinical chemistry Latin America and Canada hardware specialist with [redacted] Laboratories do Brasil in [redacted] Brazil. The record includes a letter dated December 20, 2018, from the Petitioner stating that the Beneficiary was employed as an immunoassay and clinical chemistry Latin America and Canada hardware specialist from January 17, 2000, to August 7, 2016, and that he was employed in the offered job from August 11, 2016, to the date of the letter. The record also contains a letter dated June 12, 2017, from [redacted] Laboratories do Brasil stating that the Beneficiary was employed as an immunoassay and clinical chemistry Latin America and Canada hardware specialist from January 17, 2000, to August 7, 2016.

Further, the record includes an evaluation of the Beneficiary's education from [redacted] of [redacted] Evaluation Services. He asserts 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.[3] A second evaluation in the record was written by [redacted] Dean of Studies at [redacted] College in Pennsylvania. She asserts that the Beneficiary's diploma from [redacted] University is equivalent

[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] The Educational Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), does not have an entry for the Beneficiary's credentials.

to two and one-half years of undergraduate coursework, and that the combination of this education and his over 15 years of experience in computer science and engineering 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.

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. As noted by the Director in his decision, the Petitioner indicated that no alternate combination of education and experience was acceptable at Part H.8 of the labor certification. The Director determined that the language in Part H.14 of the labor certification did not alter the minimum requirements stated on the labor certification, specifically, a bachelor's degree and 24 months of experience.

On appeal, the Petitioner asserts that the language at Part. H.14 indicated that it was willing to accept candidates without a bachelor's degree "provided they possess the educational equivalency in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)." Thus, it 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 does not claim that the Beneficiary's education alone is the foreign equivalent of a U.S. bachelor's degree, and the evaluations submitted do not establish that the Beneficiary has the foreign equivalent of a U.S. bachelor's degree based solely on his education. Rather, the Petitioner asserts that the labor certification allows the Beneficiary to qualify for the offered position with a combination of education and experience.

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.

In this case, the labor certification states that the minimum educational requirement is a U.S. bachelor's degree or a foreign equivalent degree in computer science and engineering, science, engineering, or a closely related field of study (Parts H.4, H.4-B, H.7, H.7-A, and H.9) and that the minimum experience requirement is 24 months as an immunoassay and clinical chemistry hardware specialist (Parts H.10, H.10-A, and H.10-B). 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.

Here, as noted above, the Petitioner indicated that the Beneficiary had a bachelor's degree in Part J.11 to meet the primary educational requirement. According to the record, nothing alerted DOL that the Beneficiary sought to rely on an alternate combination of education and experience.[4] The Beneficiary,

[4] 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?" As the form was completed, nothing alerted DOL that the Petitioner sought to rely

however, does not meet the primary education and experience requirements, and the Petitioner asserts that he qualifies for the offered position based on the alternative educational and experience requirements of the labor certification located at Part H.14.[5]

The minimum education and experience required by the labor certification, however, is unchanged by the language in Part H.14. The minimum requirements are still a bachelor's degree and 24 months of experience. 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.

On appeal, the Petitioner submits a non-precedent AAO decision from 2007 which analyzed the requirements of a Form ETA 750, Application for Alien Employment Certification, in conjunction with the petitioner's posting and recruitment for the position. The Petitioner asserts on appeal that the decision permits the Beneficiary to qualify for the offered job without a bachelor's degree based "alternative means." However, 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."

On appeal, the Petitioner also submits 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 the document submitted on appeal, 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).

On appeal, the Petitioner provides its internal posting for the offered position which indicated that it 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). The Petitioner asserts that "any individual seeking to understand the alternative requirements was able to directly refer to the regulatory language cited

---

on an alternate combination of education and experience.

[5] The labor certification states that the states 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 June 30, 2020). DOL would not have had an opportunity to assess this.

within the advertisements." However, the Petitioner did not provide its job order; newspaper[6] and online advertisements for the offered position; the recruitment report; and resumes or applications received from applicants during the recruitment process. Additionally, nothing in the record demonstrates that DOL audited the labor certification and accepted that the Petitioner expressed an educational equivalency. Thus, it is unclear whether U.S. applicants outside of its office were aware that the Petitioner would accept applicants with less than a U.S. bachelor's degree.

Reviewing the labor certification as a whole, we find that the Petitioner has not demonstrated that the labor certification requires less than a U.S. bachelor's or foreign equivalent degree in computer science and engineering, science, engineering, or a closely related field. The Beneficiary does not possess such a degree. Thus, the Beneficiary does not qualify for the job offered because he does not meet the minimum requirements of the labor certification.

ORDER: The appeal is dismissed.

[6] We note that the internal posting stated the following requirement for the offered position "Must have proof of legal authority to work in the United States." This requirement was not listed on the labor certification. Newspaper advertisements cannot contain any job requirements or duties which exceed the job requirements or duties listed on the labor certification, and they cannot contain wages or terms and conditions of employment that are less favorable than those offered to the Beneficiary. 20 C.F.R. § 656.17(f). In any future filings, the Petitioner must demonstrate that its advertised job requirements did not exceed the requirements listed on the labor certification.