U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21199752

Date: AUG. 23, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, computer consulting company, seeks to employ the Beneficiary as an application developer. 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 (the 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 Nebraska Service Center revoked the approval of the petition, concluding that the job offered to the Beneficiary does not qualify for advanced degree professional classification.

The Petitioner bears the burden of establishing eligibility for the requested immigration benefit. See section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal.

I. LAW

A. Employment-Based Immigration

Immigration as an advanced degree professional usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2), Matter *of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. 8 C.F.R. § 204.5(d). In this case, the priority date is August 22, 2012.

USCIS may revoke its prior approval of an immigrant visa petition "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. Revocations under 8 C.F.R. § 205.2 may be made only after issuing a notice of intent to revoke (NOIR) to the petitioner which provides the opportunity to submit evidence in support of the petition and in opposition to the alleged grounds for revocation. If the petition approval is revoked, the director must provide the petitioner with a written decision that explains the specific reasons for the revocation. Id.

A NOIR is issued for "good and sufficient cause" if the record of proceeding at the time of issuance would warrant the denial of the petition. See Matter of Estime, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, the approval of the petition is properly revoked if the record (including any NOIR response submitted by the petitioner) warrants the denial of the petition. See id. at 452; see also Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (the realization that a petition was approved in error is good and sufficient cause for revoking its approval).

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

B. Advanced Degree Professional Classification

For employment-based immigrant visa petitions requesting advanced degree professional classification, 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). An "advanced degree" is defined as an academic or professional degree above a bachelor's degree; or a bachelor's degree followed by at least five years of progressive experience. 8 C.F.R. § 204.5(k)(2). Therefore, for classification as an advanced degree professional, the accompanying labor certification must require an academic or professional degree above a baccalaureate, or a baccalaureate degree followed by at least five years of progressive experience.

II. ANALYSIS

A. Revocation of Immigrant Visa Petition Approval

In determining whether the offered position qualifies for advanced degree professional classification, we look to the terms of the labor certification. The minimum education, training, experience, and other requirements for the offered position are set forth at section H:

H.4. Education: Master's degree in computer science, engineering (any), or related field.
H.6. Experience in the job offered: 12 months.
H.8. Alternate combination of education and experience: "Bachelor's plus 5 years of progressive experience."
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 12 months as an application developer, programmer, program analyst, application.[1]

[1] The remainder of the Petitioner's text may have been cut off due to character limits on the labor certification application.

H.14. Specific skills or other requirements:

The one (1) year of IT experience must include experience with .NET Framework, ASP.NET, C#, VB.NET, SSIS, SQL SERVER 2005/2008, and XML. In lieu of the above education and experience requirements, we will accept a bachelor's degree (or equivalent in computer science, engineering (any)) or related field, plus five years of progressive experience in the IT field. One year of the five years of progressive experience must include experience with .NET Framework, ASP.NET, C#, VB.NET, SSIS, SQL SERVER 2005/2008, and XML. All experience may be acquired concurrently. We will accept any suitable combination of education, training, and/or experience in lieu of the above stated education and experience requirements. Frequent travel and relocation may be required.

The Director approved the immigrant visa petition and subsequently issued a NOIR informing the Petitioner that the petition had been approved in error. The NOIR stated that because the job offer portion of the accompanying labor certification did not state a requirement for at least a master's degree, or a bachelor's and five years of progressive experience, the petition could not be approved in the requested advanced degree professional classification. After receiving the Petitioner's NOIR response, the Director revoked the approval of the petition, concluding that the language at section H.14 stating that "We will accept any suitable combination of education, training, or experience in lieu of the above stated education and experience requirements" indicated that the Petitioner was willing to accept something less than a master's degree or a bachelor's degree followed by five years of progressive experience.

The sentence at issue in this case involves language required by DOL regulations to be added to labor certifications in certain circumstances. The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

> If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

This regulation was intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) ruling in Francis Kellogg, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc). The statement on the labor certification that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as "Kellogg language."[2]

[2] Subsequent BALCA decisions have weakened the Kellogg language requirement. In Federal Insurance Co., 2008-PER-00037 (Feb. 20, 2009), BALCA held that the ETA Form 9089 failed to provide a reasonable means for an employer to include the Kellogg language on the labor certification. Therefore, BALCA concluded that the denial of the labor certification for failure to write the Kellogg language on the labor certification application violated due process. The Petitioner cites Matter of KPIT Infosystems, Inc., 2009-PER-00075 (Feb. 25, 2009) for a similar conclusion. See also Matter of Intent Design, Ltd., 2016 WL 6561079 (confirming that, under Federal Insurance, due process precluded a literal application of this provision since there was no place on the labor certification where the Kellogg language could be placed). Also, in Matter of Agma Systems LLC, 2009-PER-00132 (BALCA Aug. 6, 2009), BALCA held that the requirement to include Kellogg language did not apply when the alternative requirements were "substantially equivalent" to the primary requirements.

As the Petitioner notes on appeal, given the history of the Kellogg language requirement, USCIS does not interpret this sentence to mean that the employer would accept lesser qualifications than the primary and alternative requirements stated on the labor certification. When a petitioner goes beyond the Kellogg language, however, we must evaluate the effect of that additional language.

When determining the minimum requirements for the offered position, we must examine "the language of the labor certification job requirements." See Madany v. Smith, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS interprets the meaning of terms used to describe the requirements of the offered position by examining the labor certification "exactly as it is completed by the prospective employer." Rosedale Linden Park Company v. Smith, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying the plain language" of the labor certification even if the employer may have intended different requirements than those stated on the form. Id. at 834. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See Madany, 696 F.2d 1008 at 1012-1013; K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983); Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey, 661 F.2d 1 (1st Cir. 1981); Matter of Symbioun Techs., Inc., 2010-PER-10422 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the labor certification clarified an employer's minimum job requirements).

In this case, the Petitioner added the phrase "in lieu of the above stated education and experience requirements" to the standard Kellogg language. The Director concluded that adding this phrase altered the minimum requirements of the position. On appeal, the Petitioner claims that there is nothing in the regulation or in the Kellogg decision that requires the Kellogg language to be included in verbatim, without alteration, for the language to qualify for the interpretation that the employer would not accept lesser qualifications than the primary and alternative requirements stated on the labor certification. In other words, the Petitioner argues that there is nothing to indicate that adding "in lieu of the above stated education and experience requirements" to the language would negate the minimum requirement of a master's degree or bachelor's degree plus five years of progressive experience.[3]

Upon de novo review, we agree with the Director. The phrase "in lieu of the above stated education and experience requirements" does more than make explicit what the Kellogg language implies. The Kellogg language indicates a petitioner's equal acceptance of candidates meeting either the primary or the alternate requirements set forth on the labor certification. By stating in section H.14 that it would accept any suitable combination of education or experience "in lieu of" the otherwise defined primary and alternate education and experience requirements, the Petitioner no longer restricts acceptable combinations to those primary and alternate requirements that are specified in section H. Rather the labor certification states that a combination of education and experience that does not necessarily accord with the minimum requirements in H.4 to H.10 could also be acceptable. In short, the statement in box H.14 of the labor certification went beyond the Kellogg language and created a different minimum requirement that allows for a combination of education, experience, or both that

[3] Additionally, although the Director did not note it, the Petitioner added "and/or" to the Kellogg language. The H.14 language states in pertinent part: "We will accept any suitable combination of education, training, and/or experience in lieu of the above stated education and experience requirements" (emphasis added).

could be less than a master's degree or a bachelor's degree followed by five years of progressive experience.

As discussed above, our interpretation of the stated job requirements must involve applying the plain language of the labor certification. See Rosedale Linden Park Company, 595 F. Supp. 829 at 834. Based on the plain language of section H of the Petitioner's labor certification, the minimum requirements of the offered position in this case can be satisfied with less than a master's degree or a bachelor's degree followed by five years of progressive experience. Accordingly, the labor certification does not support the requested advanced degree professional classification under section 203(b)(2) of the Act and 8 C.F.R. § 204.5(k)(4)(i). Therefore, we conclude that the Director had good and sufficient cause to issue the NOIR and revoke the approval of the petition. See Matter of Estime, 19 I&N Dec. 450 at 451; Matter of Ho, 19 I&N Dec. 582 at 590.

B. Education and Experience Inconsistencies

Although the Director did not address the issue in the NOIR or revocation decision, we observe inconsistencies in the record concerning the Beneficiary's academic equivalency evaluation, the dates of prior job experience listed on the labor certification, and the letters provided to establish the Beneficiary's prior employment and experience.

The Trustforte Corporation's academic equivalency evaluation states that the Beneficiary studied from 1998 to 2002 and that he finished his bachelor's degree program in July 2002. However, the Beneficiary's academic degree is dated April 2003. Additionally, the Beneficiary's transcripts suggest that he studied from 1999 to 2002 and that his eighth academic semester may have begun in July 2002 and ended in September 2002. We may, in our discretion, use an evaluation of a person's foreign education as an advisory opinion. Matter of Sea, Inc., 19 I&N Dec. 817, 820 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we may discount or give less weight to that evaluation. Id. Here, it is unclear if the academic evaluation is accurate as it pertains to the Beneficiary.

In addition, the Petitioner stated on the labor certification that the Beneficiary worked for [redacted] from January 10, 2008, to December 10, 2010. The record contains an employer letter from [redacted] which states that the Beneficiary worked from January 16, 2008, to November 26, 2010. Accordingly, the employer letter differs from what the Petitioner provided on the labor certification both in terms of the dates of employment and the employer's name. While we understand that the time periods contain a similar duration of employment, the inconsistency in the Petitioner's claims concerning the Beneficiary's experience may undermine the credibility of the evidence presented. Furthermore, the labor certification notes that the Beneficiary started working at [redacted] on January 1, 2007, while the employer letter corresponding to this experience contains no start date for the Beneficiary. In addition, the [redacted] employer letter does not explain the Beneficiary's job duties, training, or experience. Accordingly, the experience the Petitioner claimed for the Beneficiary on the labor certification is not clearly corroborated in the employer letter. The Petitioner must resolve these discrepancies with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted

in support of the requested immigration benefit. Id. Accordingly, the Petitioner should be prepared to address these discrepancies and inconsistencies in any future filings.

III. CONCLUSION

The labor certification does not support the requested classification of advanced degree professional because it does not require at least an academic or professional degree above a baccalaureate, or a baccalaureate degree followed by at least five years of progressive experience in the specialty.

ORDER: The appeal is dismissed.