U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18654918

Date: JAN. 27, 2022

Motions on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a distributor of used clothing, seeks to employ the Beneficiary as a management analyst under the second-preference, immigrant category for members of the professions holding advanced degrees or their equivalents. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of Texas Service Center denied the petition. We dismissed the Petitioner's following appeal and combined motions to reopen and reconsider. *See In Re: 13072977* (AAO Apr. 14, 2021). We agreed with the Director that the company didn't demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position or requested immigrant visa classification. We also found that the accompanying certification from the U.S. Department of Labor (DOL) does not establish the job's need for an advanced degree professional.

The matter returns to us on the Petitioner's second round of combined motions to reopen and reconsider. The company bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon review, we will dismiss the motions.

I. MOTION CRITERIA

A motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). In contrast, a motion to reconsider must establish that our prior decision misapplied law or U.S. Citizenship and Immigration Services (USCIS) policy based on the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant motions that meet these requirements and demonstrate eligibility for the requested benefit.

II. THE BENEFICIARY'S EXPERIENCE

A petitioner must demonstrate a beneficiary's possession of all DOL-certified, job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160

(Acting Reg'l Comm'r 1977). A petitioner must also establish a beneficiary's qualifications for a requested immigrant visa classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b).

The accompanying labor certification states the primary requirements of the offered position of management analyst as a U.S. master's degree or a foreign equivalent degree in business administration, with no training or experience required. The Petitioner also stated its acceptance of an alternate combination of education and experience: a bachelor's degree and five years of full-time experience. The company seeks to qualify the Beneficiary based on the job's alternate requirements. The Beneficiary's educational qualifications are not at issue. A beneficiary with a bachelor's degree followed by five years of progressive experience in a specialty qualifies as an advanced degree professional under the requested immigrant visa category. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree"). Thus, to qualify for both the offered position and requested immigrant visa classification, the Petitioner must demonstrate that, by the petition's priority date of December 1, 2010, the Beneficiary had at least five years (60 months) of full-time, progressive, post-baccalaureate experience.

Our prior decision found insufficient evidence of the Beneficiary's claimed qualifying experience. At that time, a preponderance of evidence indicated the Beneficiary's possession of 50 months of full-time, qualifying experience, including 14 months of employment in Pakistan from June 2000 to August 2001 and 36 months of employment by a prior U.S. employer from January 2007 through January 2010. But we found insufficient evidence of his claimed prior full-time employment in the U.S. from May 2005 through December 2006. Rather, from May 2005 to May 2006 and from October 2006 through December 2006, we credited him with only part-time employment. Also, for the intervening period from May 2006 to October 2006, we found insufficient evidence that he worked at all.

For labor certification purposes, part-time employment equals half the value of full-time employment. *See, e.g., Matter of Cable Television Labs., Inc.*, 2012-PER-00449 (BALCA Oct. 23, 2014) (equating 16 months of part-time experience by a noncitizen to eight months of full-time experience).[1] Thus, the Beneficiary's 15 months of part-employment from May 2005 to May 2006 and from October 2006 through December 2006 equates to about seven and a half months of full-time employment. Therefore, all told, we found that the Petitioner established full-time, qualifying experience by the Beneficiary of only about 57 and a half months, more than two months short of the required 60-month amount for the offered position and requested immigrant visa category.

On motion, the Petitioner concedes the Beneficiary's unemployment from May 2006 to October 2006.[2] But the company submits updated affidavits from the president of the Beneficiary's purported

[1] Decisions of DOL's Board of Alien Labor Certification Appeals (BALCA) do not bind USCIS. *See* 8 C.F.R. § 103.10(b) (requiring USCIS officers to follow precedent decisions of the Board of Immigration Appeals (BIA) and the Attorney General in proceedings involving the same issues). USCIS, however, may cite BALCA decisions as persuasive authority. *See Martin v. Occupational Health & Safety Review Comm'n.*, 499 U.S. 144 (1991) (requiring an administrative agency to defer to reasonable, regulatory interpretations of a sister agency charged by Congress with enforcing the regulations at issue).

[2] The Petitioner states that the Beneficiary's discovery of copies of his expired employment authorization document and his approval notice for an H-1B nonimmigrant work visa petition on his behalf reminded him of his unemployment during the period. The company states that the Beneficiary didn't work during the period because he lacked USCIS permission to do so.

former U.S. employer and five claimed former co-workers of the Beneficiary asserting his full-time employment from May 2005 to May 2006 and from October 2006 through December 2006.

With the updated affidavits, the Petitioner also submits a copy of an IRS Form W-2, Wage and Tax Statement, for 2006 of one of the Beneficiary's purported former co-workers. The Form W-2 identifies the co-worker's employer by the same name as the Beneficiary's claimed former employer. But the federal employer identification number (FEIN) on the co-worker's Form W-2 differs from the FEIN of the Beneficiary's claimed former employer, as listed on his Forms W-2 from 2005 to 2010 and the employer's federal income tax returns for the same period. Also, USCIS records indicate that, from December 2000 to June 2009, the Beneficiary's claimed former employer filed petitions under three, separate FEINs: the number on the Beneficiary's Forms W-2 and the company's tax returns; the number on the Form W-2 of his purported co-worker; and a third, different FEIN.

On appeal, we accepted the Petitioner's explanation that, even though the Beneficiary initially worked at the site of an affiliate of his former U.S. employer, the former employer paid him during his entire, claimed tenure from 2005 to 2010. The new evidence submitted on motion, however, highlights discrepancies in the FEIN of the claimed former employer and casts doubt on the employer's identity and the authenticity of the evidence we previously accepted supporting the employer's purported payments to the Beneficiary. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). Without resolution of the purported former employer's FEIN, the record does not demonstrate the Beneficiary's claimed qualifying experience. Rather, upon consideration of the new evidence and the additional, unexplained discrepancies it raises, the Petitioner has established the Beneficiary's possession of only 14 months of full-time, qualifying experience in Pakistan, not the 57-and-a-half-month total previously indicated.

For the foregoing reasons, the Petitioner hasn't established the Beneficiary's qualifying experience for the offered position or the requested immigrant visa category.

III. THE POSITION'S NEED FOR AN ADVANCED DEGREE PROFESSIONAL

A labor certification accompanying a petition for an advanced degree professional must demonstrate that the offered position requires an advanced degree professional. 8 C.F.R. § 204.5(k)(4)(i). As previously indicated, the term "advanced degree" includes a bachelor's degree followed by five years of progressive experience in a specialty. 8 C.F.R. § 204.5(k)(2).

The Petitioner's labor certification states the company's acceptance of the alternate requirement of a bachelor's degree followed by five years of progressive experience. But, in part H.14, "Specific skills or other requirements," the certification also states the Petitioner's acceptance of "a Bachelor's equivalent based on a combination of education as determined by a professional evaluation service."

We agreed with the Director that, contrary to requirements of the requested immigrant visa category, the Petitioner's language in part H.14 of the labor certification allows the equivalent of a U.S. bachelor's degree based on a combination of lesser educational credentials. For example, in support of a prior Form I-140 petition for the Beneficiary, an employer submitted an independent, professional evaluation stating that the Beneficiary's combination of a two-year bachelor's degree from Pakistan

and a two-year associate's degree from the United States equated to a U.S. bachelor's degree. For "advanced degree" purposes, regulations do not allow combinations of lesser degrees as baccalaureate equivalents. Rather, the equivalent of an advanced degree, if followed by at least five years of progressive experience, is "[*a*] United States baccalaureate degree or *a* foreign equivalent degree." 8 C.F.R. § 204.5(k)(2) (emphasis added); *see also* Final Rule for Immigrant Visa Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (stating that "both the Act and its legislative history make clear that, in order to . . . have experience equating to an advanced degree under the second [preference immigrant category], *an alien must have at least a bachelor's degree*") (emphasis added). Thus, for purposes of the requested immigrant visa category, a foreign equivalent of a U.S. bachelor's degree must constitute a single degree.

On motion, the Petitioner submits an affidavit from its manager and argues that we should consider the company's intended meaning of the language in part H.14 of the labor certification. The manager states that the language means that "a foreign bachelor's degree and foreign master's degree can be combined to be a U.S. equivalent bachelor's degree."

The Beneficiary has a two-year, Pakistani bachelor's degree in commerce followed by a two-year, Pakistani master's degree in the same field. We agree that the Beneficiary's master's degree in commerce equates to a U.S. bachelor's degree in business administration and that he therefore has a single-degree, foreign baccalaureate equivalency. But the Petitioner's explanation of its language in part H.14 is otherwise unconvincing. First, the explanation would render the language redundant. In part H.9 of the labor certification, the company indicated its acceptance of a foreign equivalent of a U.S. bachelor's degree. Also, as the Petitioner argues, Form I-140 petitioners generally demonstrate foreign educational equivalencies by submitting educational evaluations from professional services. Thus, under the Petitioner's claimed intent, its language in part H.14 of the labor certification would be unnecessary.

Also, the Petitioner has provided inconsistent rationales for its language in part H.14 of the labor certification. In response to the Director's notice of intent to deny the petition, the Petitioner described the language as "*Kellogg* language." Under *Matter of Francis Kellogg*, 94-INA-464 (BALCA Feb. 2, 1998) (*en banc*), labor certification employers employing noncitizens who qualify for offered positions based only on alternate requirements must state the business' acceptance of "any suitable combination of education, training, or experience." *See also* 20 C.F.R. § 656.17(h)(4)(ii) (codifying the *Kellogg* language). The Petitioner initially asserted that its language in part H.14 "complies with the '*Kellogg*' language and is clear evidence of Petitioner's intent to hire [an] individual with Beneficiary's qualifications." The Petitioner has not explained its differing rationales for the language in part H.14, casting doubt on the verbiage's true purpose. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record).

The Petitioner's manager further argues that, during labor certification proceedings, the company's advertisements for the offered position did not indicate the business's acceptance of a combination of lesser degrees. Rather, she states that, pursuant to the primary and alternate requirements listed on the certification, the ads required either a bachelor's or master's degree in business administration.

The Petitioner, however, hasn't provided copies of its ads or any applicant resumes received in response to them. Thus, the record does not establish how the company advertised the requirements

or its rejection of applicants with equivalent combinations of lesser degrees. The manager's letter therefore does not sufficiently support the Petitioner's rationale on motion for the language in part H.14 of the labor certification.

The Petitioner also argues that its language in part H.14 complies with the requirements for the requested immigrant visa category. The Petitioner contends that, like the requirements for an advanced degree professional, the company's verbiage in part H.14 limits the company's acceptance to only a "Bachelor's equivalent." As previously indicated, however, the requested visa category more specifically requires a foreign equivalent of a U.S. bachelor's degree to constitute a single degree. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree"). In contrast, the Petitioner's language allows *any* combination of educational credentials found equivalent to a U.S. bachelor's degree, potentially including combinations of lesser credentials.

Finally, the Petitioner cites numerous BALCA decisions accepting language like the company's on labor certification applications. *See, e.g., Matter of Yazaki N. Am., Inc.,* 2014-PER-01514 (BALCA Feb. 25, 2019) (listing "any suitable combination of education, training, or experience"); *Matter of NCS Pearson, Inc.*, 2015-PER-00110 (BALCA Jan. 24, 2019) (listing "[a]ny combination of educ, tng, and/or exp. equivalent to U.S. bachelor's degree as determined by written evaluation"); *Matter of Sure Tech Servs., Inc.*, 2015-PER-00449 (BALCA Jun. 28, 2018) (listing "[a]ny combination of education from any institution deemed equivalent"). In these cases, however, the employers listed their language as alternate job requirements in part H.8 of their applications, and BALCA considered only whether the stated alternate requirements reflected the "actual minimum requirements" of the offered positions. *See* 20 C.F.R. § 656.17(i)(1). In contrast, the Petitioner listed its language in part H.14 of its labor certification application to clarify its alternate requirement. Thus, the BALCA cases cited by the Petitioner do not rule on the issue before us: whether the Petitioner's stated alternate requirements, as clarified in part H.14, requires an advanced degree professional. The BALCA cases are therefore distinguishable from this matter.

IV. CONCLUSION

Neither the Petitioner's evidence nor arguments on motion demonstrate the Beneficiary's qualifying experience for the offered position or requested immigrant visa category. The company's motions also do not establish the offered position's need for an advanced degree professional. We will therefore affirm our dismissal of the Petitioner's appeal.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.