U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28451679

Date: OCT. 6, 2023

Motions on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, an electronics manufacturer's representative, seeks to permanently employ the Beneficiary as a sales engineer. The company requests his classification under the employment-based, second-preference (EB-2) immigrant visa category as a member of the professions holding an "advanced degree" or its equivalent. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). U.S. businesses may sponsor noncitizens for permanent residence in this category to work in jobs requiring at least bachelor's degrees followed by five years of progressive experience in applicable specialties. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree").

The Director of the Nebraska Service Center denied the petition, and we dismissed the Petitioner's following appeal and combined motions to reopen and reconsider. *See In Re: 24834421* (AAO Feb. 7, 2023). We affirmed the Director's conclusion that the accompanying certification from the U.S. Department of Labor does not demonstrate the offered job's need for an advanced degree professional. We also found that, contrary to regulations, the labor certification is not an original certification signed by the Beneficiary.

The matter returns to us on another round of combined motions to reopen and reconsider. The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motions.

I. LAW

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 demonstrate 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). On motion, we can only review our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that meet these requirements and demonstrate eligibility for the requested benefit. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring new evidence to have the potential to change a case's outcome).

A. Motion to Reopen

The Petitioner's motion to reopen lacks an original labor certification signed by the Beneficiary or other new evidence. *See* 20 C.F.R. § 656.17(a)(1) (stating that USCIS "will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent"). Thus, contrary to 8 C.F.R. § 103.5(a)(2), the motion does not state "new facts." Because the motion does not meet applicable requirements, we must dismiss it. 8 C.F.R. § 103.5(a)(4).

B. Motion to Reconsider

The Petitioner asserts that USCIS found the Beneficiary eligible as an advanced degree professional. The company contends that the "remaining issue" is whether he qualifies for a waiver of the EB-2 category's job-offer requirement and thus of a labor certification.

Contrary to the Petitioner's contentions, however, neither we nor the Director made a finding regarding the Beneficiary's qualifications as an advanced degree professional. *See, e.g., In Re: 22146834*, *3 n.3 (AAO July 28, 2022) ("We make no finding concerning the Beneficiary's qualifications.") Rather, both we and the Director found that the company's labor certification does not demonstrate the offered job's need for an advanced degree professional. *See* 8 C.F.R. § 204.5(k)(1) ("The job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent.") Even if the Beneficiary qualifies as an advanced degree professional, the petition cannot be approved because the job-offer portion of the labor certification does not require an advanced degree professional.

Also, the company's contentions refer to a national interest waiver. *See* section 203(b)(2)(B)(i) of the Act. As explained in our prior decision, the Petitioner marked box 1.d. in Part 2 of its Form I-140, Immigrant Petition for Alien Worker, indicating its request for the Beneficiary's classification as "[a] member of the professions holding an advanced degree . . . (who is **NOT** seeking a National Interest Waiver (NIW)." (emphasis in original). If the company sought a national interest waiver, it should have marked box 1.h. in Part 2 of its Form I-140 as "[a]n alien applying for an NIW."

Because USCIS has already decided the petition under the marked visa category, we cannot now consider a request to change the classification. *See* USCIS, "Petition Filing and Processing Procedures for Form I-140," https://www.uscis.gov/forms/all-forms/petition-filing-and-processing-procedures-for-form-i-140-immigrant-petition-for-alien-workers ("We cannot change the visa category if we have already made a decision on your Form I-140.") We therefore will not consider the Beneficiary's eligibility for a national interest waiver.

The Petitioner's remaining arguments reflect continued confusion about the requested immigrant visa category and the scope of these proceedings. The company contends that the Beneficiary's bachelor's degree and employment experience demonstrate that he is "well-positioned" to advance his proposed endeavor. But his positioning to advance a proposed endeavor is a requirement for a national interest waiver. *See Matter of Dhanasar*, 26 I&N Dec. 884, 890 (AAO 2016). As previously explained, the Petitioner did not request a national interest waiver on its Form I-140, and USCIS policy prevents us from changing the classification after a decision's issuance.

The Petitioner also argues that it has the ability to pay the offered job's proffered wage. But, although petitioners must demonstrate their abilities to pay proffered wages under 8 C.F.R. § 204.5(g)(2), neither we nor the Director faulted the company's filing on that basis. The Petitioner's ability to pay the proffered wage is therefore irrelevant in these appellate proceedings.

III. CONCLUSION

The motion to reopen omits a required original labor certification signed by the Beneficiary and does not otherwise meet applicable requirements. The motion to reconsider does not demonstrate our misapplication of law or policy.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.