U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 28604190

Date: SEP. 18, 2023

Motions on Administrative Appeals Office Decision

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

The Petitioner, a provider of information technology consulting services, seeks to permanently employ the Beneficiary as a senior Java software 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." *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").

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval and dismissed the Petitioner's following motion to reopen. The Director concluded that the company willfully misrepresented its intent to employ the Beneficiary in the offered job. On appeal, we withdrew the Director's decision and remanded the matter. *See In Re: 1525587* (AAO Sep. 3, 2020). On remand, the Director again revoked the petition's approval, finding that the Petitioner did not demonstrate the Beneficiary's qualifying experience for the job. On appeal, we affirmed the Director's decision. *See In Re: 24227618* (AAO Mar. 2, 2023).

The matter returns to us on the Petitioner's combined motions to reopen and reconsider. The company submits additional evidence and contends that U.S. Citizenship and Immigration Services (USCIS) concealed derogatory information from it and improperly disregarded affidavits from the Beneficiary and his purported former co-workers as proof of his qualifying experience.

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 conclude that the company has not demonstrated our misapplication of law or policy or the Beneficiary's qualifying experience for the offered job. We will therefore 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 establish that our prior decision misapplied law or USCIS

policy based on the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). Motions must challenge only our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant filings 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 potentially change a case's outcome).

## II. ANALYSIS

### A. Motion to Reconsider

#### 1. The Beneficiary's 2010 Nonimmigrant Visa Application

To demonstrate the Beneficiary's qualifying experience for the offered position of senior Java software engineer, the Petitioner must establish that, by the petition's February 5, 2008 priority date, he gained at least two years of experience in the job offered or as a programmer analyst. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). Also, as stated in part H.14 of the accompanying certification from the U.S. Department of Labor (DOL), the "[t]wo years of required experience must be experience performing design, development, testing and implementation in MVC architecture using J2EE, JSP, JDBC, OOA/OOD, Rational Rose, XML and deploying EJBs on Weblogic/Websphere application server." *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

We concluded that the Petitioner did not demonstrate the Beneficiary's qualifying experience or performance of the skills stated in part H.14 of the labor certification, in part, because of unresolved inconsistencies on his 2010 application for a U.S. nonimmigrant work visa. We found that his descriptions of his former job duties on the visa application differed from those listed in letters from the corresponding employers.

On motion, the Petitioner contends that we violated 8 C.F.R. § 103.2(b)(16) by not providing the company with a copy of the Beneficiary's 2010 visa application. The company states that the Beneficiary does not - and should not be expected to - have a copy of the application. The Petitioner argues that we provided "snippets" of derogatory information listed on his 2010 form "that the AAO in its sole discretion deemed to be material." The company notes that our decision does not indicate the information's protection from disclosure on national security grounds, which the company claims is the regulation's sole exception to inspection of the record. The Petitioner contends that we withheld derogatory information from it while holding the Beneficiary to "a standard of complete consistency" regarding descriptions of his former job duties and titles. The company states: "A summary [of derogatory evidence] does not suffice when the standard against which the Beneficiary's evidence is measured is one of a 100% match."

The Petitioner, however, misunderstands the regulation at 8 C.F.R. § 103.2(b)(16). The regulation permits a petitioner "to inspect the record of proceeding which constitutes the basis for the decision, *except as provided in the following paragraphs*." 8 C.F.R. § 103.2(b)(16) (emphasis added). Thus, the regulation lists exceptions to the general rule that allows a petitioner to inspect a record. As the Petitioner states, one of the exceptions is information "classified . . . as requiring protection from

unauthorized disclosure in the interest of national security." 8 C.F.R. § 103.2(b)(16)(iv). But, contrary to the Petitioner's argument, that exception is not the only one. The regulation states:

> If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered.

8 C.F.R. § 103.2(b)(16)(i). Thus, USCIS also need not allow a petitioner to inspect derogatory information if - before a decision's issuance - the Agency advises a petitioner of the information and provides the business a chance to respond.

The record shows that, in a notice of intent to revoke (NOIR) the petition issued before the most recent revocation decision, the Director notified the Petitioner of the derogatory information in the Beneficiary's 2010 visa application. The NOIR alleges inconsistencies in the Beneficiary's descriptions of his job duties and titles on the visa application, quotes the application, and affords the Petitioner a reasonable opportunity to respond. Thus, USCIS complied with the regulation at 8 C.F.R. § 103.2(b)(16)(i) and need not have provided the Petitioner with a copy of the visa application. *See Hassan v Chertoff*, 593 F.3d 785, 787 (9th Cir. 2010) (concluding that 8 C.F.R. § 103.2(b)(16)(i) requires only that the government make a petitioner "aware" of derogatory information used against it and provide it with an opportunity to explain); *see also Owusu-Boakye v. Barr*, 836 Fed. App'x 131, 136 (4th Cir. 2020) (holding that 8 C.F.R. § 103.2(b)(16)(i) did not require USCIS to produce a copy of a statement of findings but only to summarize its derogatory information).

The Petitioner cites cases in support of its argument, but they are unavailing. Two cases involve remands of immigrant visa petitions by U.S. citizens for their spouses. *See Matter of Holmes*, 14 I&N Dec. 647 (BIA 1974); *Matter of Arteaga-Godoy*, 14 I&N Dec. 226 (BIA 1972), *overruled on other grounds by Matter of Sano*, 19 I&N Dec. 299, 301 (BIA 1985). But, unlike in the Petitioner's case, the records in *Holmes* and *Arteaga-Godoy* showed that, before the denials' issuances, the petitioners received neither notifications of derogatory information nor opportunities to respond. *Matter of Holmes*, 14 I&N Dec. at 647; *Matter of Arteaga-Godoy*, 14 I&N Dec. at 228. The facts of those cases therefore distinguish them from the Petitioner's.

As the Petitioner argues, the United States Court of Appeals for the Seventh Circuit expressed frustration with USCIS after the Agency did not provide another marriage-based petitioner with a copy of a derogatory statement from the beneficiary's prior spouse. *See Sehgal v. Lynch*, 813 F.3d 1025, 1031 (7th Cir. 2016). The court stated: "We have stressed before that 'the better procedure' is for agencies to 'produce the statement in question,' and we are puzzled by USCIS' continued failure to do so." *Id.* (quoting *Ghaly v. INS*, 48 F.3d 1426, 1435 (7th Cir. 1995)). But the *Sehgal* court ultimately upheld USCIS' actions, stating that "we also have recognized that a summary [of derogatory information] can suffice, . . . and here USCIS provided more than the summary we found in *Ghaly* was adequate." *Id.* at 1031-32. Thus, the *Sehgal* citation supports our interpretation of 8 C.F.R. § 103.2(b)(16)(i).

The Petitioner's remaining citation also does not support the company's argument. *Donnelly v. Controlled Application & Resolution Program Unit*, 503 F. Supp. 3d 100 (S.D.N.Y. 2020), *aff'd but criticized*, 37 F.4th 44 (2d Cir 2022), is a U.S. district court case that binds only its parties. *See Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993) (holding that U.S. district court decisions do not bind immigration agencies in other matters involving the same issues, even those within the same district). Also, the *Donnelly* court ruled that it lacked jurisdiction over the matter. *Donnelly*, 503 F. Supp. 3d at 105-06. Thus, the court's interpretation of 8 C.F.R. § 103.2(b)(16) in its decision is merely dicta.

Also, even if we adopted the Petitioner's interpretation of 8 C.F.R. § 103.2(b)(16) and credited the job duty and job title descriptions on the Beneficiary's 2010 visa application as consistent with other evidence, the record would not establish his qualifying experience for the offered job. We cited the information on the visa application regarding the Beneficiary's claimed employment from October 2006 to December 2007 and from July 2005 to September 2006. But, contrary to part H.14 on the labor certification, the letters from his purported former employers during those periods do not sufficiently establish his experience "performing design, development, testing and implementation in MVC architecture using J2EE, JSP, JDBC, OOA/OOD, Rational Rose, XML and deploying EJBs on Weblogic/Websphere application server." Thus, even if we interpreted 8 C.F.R. § 103.2(b)(16) as the Petitioner asserts we should, the record would not demonstrate the Beneficiary's qualifying experience for the offered job.

The Petitioner also contends that we improperly compared the employment information on the Beneficiary's 2010 visa application to evidence of his claimed, qualifying experience with the Form I-140, Petition for Immigrant Worker. The company warns that we must make reasonable inferences from evidence. *See Matter of Koden*, 15 I&N Dec. 739, 744-45 (A.G.; BIA 1976) (holding that the Board of Immigration Appeals (BIA) properly drew inferences from a witness's testimony that an attorney had an "unethical" relationship with another). The Petitioner contends that the inferences we drew from the Beneficiary's visa application are unreasonable because the immigrant visa petition and the labor certification demand greater specificity regarding his employment history than the visa application. The company states that "it is not reasonable to infer that the Beneficiary (or any other person) completes a [nonimmigrant visa application] with the same amount of detail that is included in an experience letter or a Labor Certification form."

We agree with the Petitioner that an immigrant visa petition's components usually require more details regarding a noncitizen's employment history than a nonimmigrant visa application. But we did not conclude that the information on the Beneficiary's 2010 visa application lacked specificity. Rather, we concluded that it conflicted with other evidence. For example, as stated in our appellate decision, a former employer's letter describes the Beneficiary's work, from July 2005 through September 2006, as involving "design, implementing and developing the enterprise applications using the 'SunSolaris, Windows NT, Oracle, C++, JAVA, JSP, GUI, HTML, SQL, PL/SQL' technology stack." In contrast, the visa application states that, while working for the same employer over the same period, he "collect[ed] the business requirements;" and used "Rational Software for design [of] the application;" "Myeclipse, Java, Hibernate to develop the application;" and "Jira Tool for defect logging." The information on the visa application does not lack specificity. Rather, it details job duties and technological skills different from those stated in the employer's letter. The discrepancies cast doubt on his duties with the employer and require explanation. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies with independent, objective evidence

pointing to where the truth lies). We therefore did not draw unreasonable inferences from the visa application.

For the foregoing reasons, the Petitioner has not demonstrated our misinterpretation of 8 C.F.R. § 103.2(b)(16) by not providing the company with a copy of the Beneficiary's 2010 visa application. The Petitioner has also not demonstrated any improper comparison of information on the visa application to evidence in the petition. We will next consider whether we gave sufficient evidentiary weight to affidavits submitted by the company.

2. The Affidavits from the Beneficiary and His Purported Former Co-Workers

To demonstrate qualifying experience, a petitioner must generally submit letters from a beneficiary's former employers. 8 C.F.R. § 204.5(g)(1). The letters must include the employers' names, addresses, and titles, and describe the beneficiary's experience. *Id.* But, "[i]f such evidence is unavailable, other documentation relating to the alien's experience or training will be considered." *Id.*

The Beneficiary claimed that he gained qualifying experience with six former employers. But the Petitioner provided letters from only four of them, and one of the letters did not meet regulatory requirements because it did not describe the Beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1). In response to the Director's most recent NOIR, the company submitted an affidavit from the Beneficiary, stating that the three former employers in India were not "willing to provide any kind of letter about my experience as their employee." In lieu of the letters, the company submitted affidavits from six of the Beneficiary's purported former co-workers: two who worked with him at one employer from May 2004 through December 2004; two who worked with him at another employer from October 2002 through April 2004; and two who worked with him at the third employer from January 2000 to September 2002. We did not consider the affidavits from the purported former co-workers, finding that, contrary to 8 C.F.R. § 204.5(g)(1), the Petitioner did not demonstrate the unavailability of the regulatory required letters from the former employers. We also found the affidavits to be unreliable, as the record lacks independent evidence of the co-workers' employment by the former employers during the Beneficiary's tenures with them.

Citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966), the Petitioner argues that we should have credited the affidavits of the Beneficiary and his purported former co-workers. The company contends that, in *Brantigan*, the Board "reversed the denial of a [marriage-based immigrant visa petition] based on one person's written testimony."

The Petitioner, however, misstates the facts of *Brantigan*. There, the Board had previously affirmed the denial of the U.S. citizen petitioner's immigrant visa petition for his spouse, ruling that the petitioner did not establish the legal termination of his prior marriage. *Matter of Brantigan*, 11 I&N Dec. at 493. On motion, the petitioner submitted an affidavit from his daughter regarding the absence of her mother, the petitioner's prior spouse. *Id.* at 495. Contrary to the Petitioner's contention, the Board did not "reverse" the petition's denial, but merely reopened and remanded the proceedings. *Id.* Also contrary to the company's argument, the Board did not indicate that a final decision would rest solely on the affidavit of the petitioner's daughter. *Id.* Rather, the Board ordered an immigration service officer, on remand, to question her under oath regarding her mother's absence and to determine

what efforts the petitioner made to communicate with his first spouse. *Id.* Thus, under its true facts, *Brantigan* does not support this petition's approval.

Also, the affidavits of the Beneficiary and his purported former co-workers do not merit a remand of this matter. The Director's most recent NOIR notified the Petitioner of its need to demonstrate the unavailability of any employer letters and afforded it a reasonable opportunity to respond. As discussed in our appellate decision, the Beneficiary's affidavit is insufficient to establish the unavailability of letters from the three former Indian employers. In the affidavit, the Beneficiary merely states that "none of these companies are willing to provide any kind of letter about my experience as their employee." The affidavit does not explain how the Beneficiary knows that the companies will not provide a required letter. The record does not indicate that he or the Petitioner tried to obtain letters from the companies or that they no longer do business. Also, the record lacks independent evidence corroborating the purported co-workers' claimed employment during the Beneficiary's tenures with the companies.

The Petitioner also contends that we misread 8 C.F.R. § 204.5(g)(1) by requiring letters from the Beneficiary's former employers to state his former job titles. The company notes that, although the regulation requires employer letters to describe beneficiaries' experiences, it does not require their job titles.

But we did not reject any employer letters for omitting the Beneficiary's job titles. Rather, we noted inconsistencies in his job titles and duties as listed in employer letters and on his 2010 visa application. Also, contrary to the Beneficiary's attestations on the labor certification, employer letters suggest his employment in multiple positions by stating "[h]is last designation held with us." Our primary concern with his potential work in multiple positions at the same employer is not inconsistent job titles, but the Beneficiary's possible performance of non-qualifying duties with an employer. On the labor certification, the Petitioner required experience "in the job offered" or as a programmer analyst. Experience "in the job offered" means experience performing the key duties of the offered job as listed on the labor certification. *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *3 (BALCA Oct. 24, 2011). Thus, his performance of non-qualifying duties could render him ineligible for the offered position. Also, to the extent the Petitioner accepts experience in the alternate occupation of programmer analyst, we must examine the Beneficiary's job titles to determine his eligibility. Thus, we reject the Petitioner's contention that we misconstrued 8 C.F.R. § 204.5(g)(1).

For the foregoing reasons, the Petitioner's motion to reconsider does not establish our misapplication of law or policy or the Beneficiary's qualifying experience for the offered job. We will therefore dismiss the motion.

B. Motion to Reopen

The Petitioner submits the following new evidence on motion:

1. The Co-Worker's Employment Letter

The Petitioner provides a copy of a 2005 employment letter for one of the Beneficiary's co-workers who provided an affidavit for him. The letter states that the co-worker worked at the Beneficiary's

former employer from April 2004 to June 2005. This period includes the Beneficiary's claimed employment there from May 2004 through December 2004.

The letter constitutes independent evidence of the affiant's claimed employment. But the Petitioner still has not demonstrated the unavailability of a regulatory required letter from the former employer. *See* 8 C.F.R. § 204.5(g)(1). Thus, despite the confirmation of the co-worker's employment with the Beneficiary, we decline to consider the co-worker's affidavit as proof of the Beneficiary's qualifying experience.

2. SEC Documents

The Petitioner also submits copies of documents filed with the U.S. Securities and Exchange Commission (SEC) to show that the Indian company that employed the Beneficiary from January 2000 to September 2002 terminated its business. But the documents indicate only that, in 2002, a U.S. corporation acquired another U.S. corporation with a name similar to the Beneficiary's Indian employer. The documents do not state a relationship between the acquired U.S. company and the Beneficiary's former Indian employer, or that the acquiring U.S. corporation also acquired his former Indian employer as the named company in the SEC documents is similar, but not the same as the foreign employer. Thus, the documents do not establish that the Beneficiary's former employer terminated its business in 2002.

3. Other Evidence

The Petitioner's other evidence on motion includes printouts of an online immigration discussion forum and a copy of a blank U.S. nonimmigrant visa application form. The Petitioner submitted the printouts of the immigration forum as evidence that many companies do not provide former employees with letters verifying their employment. The printouts indicate that employers are not legally required to provide such letters to their former employees. As previously discussed, the Petitioner has not demonstrated that any of the Beneficiary's former employers declined to provide him with a letter for this reason. The printouts therefore do not establish the unavailability of the missing employer letters or his qualifying experience for the offered job.

The Petitioner submitted the copy of the blank U.S. nonimmigrant visa application form to support its claim that we improperly compared employment information on the Beneficiary's visa application to similar information in the petition. As previously discussed, we agree that immigrant visa petitions generally require more detailed information regarding a noncitizen's employment history than a nonimmigrant visa application. But we conclude that we properly compared the employment information on the documents because the Beneficiary provided detailed employment information on his visa application that conflicted with evidence in the petition. The copy of the blank visa application form therefore does not establish our misapplication of law or the Beneficiary's qualifying experience for the offered job.

## III. CONCLUSION

The Petitioner's motion to reconsider does not demonstrate our misapplication of law or policy, and both the company's motions to reconsider and reopen do not establish the Beneficiary's qualifying experience for the offered job.

**ORDER:** The motion to reconsider is dismissed.

**FURTHER ORDER:** The motion to reopen is dismissed.