U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24605390

Date: FEB. 10, 2023

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, an information technology services company, seeks to employ the Beneficiary as a programmer analyst. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a noncitizen for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Beneficiary meets the minimum education requirements for the job as set forth in the labor certification. We dismissed the appeal. The matter is now before us on a motion to reconsider.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motion.

A motion to reconsider must establish that our decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy, and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the benefit sought.[1]

On motion, the Petitioner submits a brief arguing that we erred in determining that the Beneficiary does not have the equivalent of a U.S. bachelor's degree. Further, the Petitioner argues that we erred in applying the law and regulations as they pertain to the minimum qualifications listed in the associated labor certification.

In dismissing the appeal, we agreed with the Director's determination that the Beneficiary did not possess the qualifications set forth in the associated labor certification. To reiterate from our prior decision, which we incorporate here by reference, the labor certification indicated that the minimum

[1] The scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i).

qualifications needed for the programmer analyst position are a "bachelor's degree or foreign equivalent" plus one year of experience in the job offered or a related occupation. Part H.14 of the labor certification included *Kellogg* language noting that "any suitable combination of education, training, or experience is accepted." We noted that the labor certification did not permit an alternate combination of education and experience in section H.8. or indicate that anything other than a U.S. bachelor's degree (or foreign equivalent) would be accepted to satisfy the minimum educational requirement. Moreover, we explained that the *Kellogg* language does not change the minimum education and experience required by the labor certification because we generally do not interpret the insertion of the language to alter the minimum requirements as stated in the labor certification. As such, the minimum requirements, based on a plain language reading of the labor certification are a U.S. bachelor's degree or foreign equivalent, plus 12 months of experience.

On motion, the Petitioner argues that our decision ignored the *Kellogg* language, which it asserts provided alternate qualifications for the position. In addition, the Petitioner contends that sections H.4 and H.14 of the labor certification should be read together. However, the Petitioner's motion does not account for its decision to not indicate acceptance of an alternate combination of education and experience. When instructed in Part H.4 of the labor certification to indicate the minimum level of education required for the offered position, the Petitioner selected "Bachelor's" rather than "Associate's" or "other" educational credential.[2] Moreover, the Petitioner also indicated in Part H.8 that there is "No" acceptable alternate combination of education and experience acceptable. As we noted in our prior decision, as a matter of policy, USCIS generally does not interpret the insertion of *Kellogg* language in Part H.14 to mean that the employer would accept lesser qualifications than the stated primary or alternate requirements. Were we to read the *Kellogg* language as an alternate requirement, the actual minimum requirements of the position as stated in the labor certification would be impossible to discern, and the primary and alternate requirements would be rendered meaningless.

The Petitioner cites to *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3961005 (D. Or., Nov. 30, 2006) for the propositions that USCIS can not require a single equivalent degree and also to argue that the U.S. Department of Labor (DOL) is charged with determining what the minimum qualifications for a position are as set forth in the labor certification. Contrary to the Petitioner's assertions, DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available to perform the position, and whether the employment of the beneficiary will adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). It is important to note that none of DOL's assigned responsibilities under 20 C.F.R. § 656, involve a determination as to whether the noncitizen is qualified for a specific immigrant classification or even the job offered. *See Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983) (determining that all matters not expressly delegated to the DOL remain within [DHS's] authority.) Furthermore, the Petitioner's argument overlooks the regulatory requirement that the Petitioner establish that the Beneficiary meets the educational, training or experience, and any other requirements of the labor certification as required by the regulation found at 8 C.F.R. § 204.5(l)(3)(ii)(B).

The Petitioner further contends that we did not give sufficient weight to the fact that both the Indian and U.S. governments consider the Beneficiary's credentials to be the equivalent of a bachelor's

[2] The Petitioner also marked "Bachelor's," as opposed to "other" as the "highest level achieved as required by the requested job opportunity" in Part J.

degree. As a matter of discretion, we may use opinion statements submitted by a petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we may give an opinion less weight if it is not in accord with other information in the record or if it is in any way questionable. *Id.* We are ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought, and the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if "it will assist the trier of fact to understand the evidence or to determine a fact in issue."). Here, the evaluations do not establish that [redacted] is a university, college, or other post-secondary educational institution.

As noted in our prior decision, the Beneficiary received her qualifying education through [redacted] an Indian professional association that administers examinations leading to the conferral of a certificate. The Petitioner's evidence does not establish that [redacted] is an educational institution that confers bachelor's degrees or that the Beneficiary enrolled or attended any college, university, or other post-secondary educational institution. Instead, as noted in the evaluations provided, she earned her associate membership in [redacted] by passing a series of examinations offered by a professional association. While the [redacted] certificate is deemed equivalent to a bachelor's degree for certain purposes, it is not a foreign equivalent degree and does not represent an equivalent educational background, as required under the language found in the labor certification. Furthermore, as to the Petitioner's argument that we did not give enough probative weight to the evaluations, as we have previously determined, the evaluations do not support a conclusion that the [redacted] is a college or university or that an associate membership (which is based on a combination of practical experience and examinations) is a "baccalaureate degree." The Morningside Evaluations' memorandum dated January 17, 2019 states that completion of [redacted] is on par, in India, with completion of a bachelor's degree for the purpose of master's level graduate admissions, and that in the United States, an Indian master's degree would be equivalent to a U.S. master's degree. However, the evaluation does not state that [redacted] is an educational institution that confers bachelor's degrees. As such, the evaluations provided are not sufficient to overcome this evidentiary deficiency.

Furthermore, and as previously noted in our original decision, the Petitioner has not established that during the recruitment process, U.S. workers were informed that applicants could meet the educational requirements for the offered position through membership in a foreign professional association in lieu of possessing a U.S. bachelor's degree or a foreign equivalent degree, as stated in the labor certification. Without this evidence, DOL would not be able to determine if qualified U.S. workers were left out of the recruitment process, which could have affected its determination that there were insufficient U.S. workers able, willing, qualified, and available to perform the offered position.

For the foregoing reasons, the Petitioner has not shown that our prior decision contained errors of law or policy, or that the decision was incorrect based on the record at the time of that decision. Therefore, the motion does not meet the requirements of a motion to reconsider, and it must be dismissed.

ORDER: The motion to reconsider is dismissed.