U.S. Citizenship and Immigration Services

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

In Re: 24461885

Date: JAN. 25, 2023

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a provider of health care products and services, seeks to employ the Beneficiary as an area immunoassay and clinical chemistry specialist. 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 immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Beneficiary met the minimum education requirements stated on the labor certification. We dismissed the Petitioner's appeal of the Director's decision. The Petitioner subsequently filed a combined motion to reopen and reconsider, followed by a motion to reconsider, and we dismissed both motions. The matter is now before us on motion to reconsider. 8 C.F.R. § 103.5(a).

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.

## I. LAW

### A. Motion Requirements

A motion to reconsider must (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) demonstrate that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. A motion that does not meet the applicable requirements must be dismissed. 8 C.F.R. § 103.5(a)(4).

B. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition (Form I-140) with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the beneficiary may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

## II. ANALYSIS

The scope of a motion is limited by regulation to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). Therefore, the issue before us is whether the Petitioner has provided proper cause for reconsideration of our decision dated July 19, 2022, in which we dismissed its prior motion to reconsider.

A. Facts and Procedural History

As noted, the Director denied the Form I-140 based on a determination that the record did not establish that the Beneficiary met the minimum education requirements for the offered position. A beneficiary must meet all the requirements of the offered position set forth on the labor certification by the priority date[1] of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). USCIS examines the job offer portion of the labor certification to determine a position's minimum requirements. We may neither ignore a term on the labor certification nor impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983).

Here, the accompanying labor certification states the primary, minimum requirements of the offered position are a U.S. bachelor's degree or a foreign equivalent degree in computer science and engineering, science, engineering, or a closely related field (Parts H.4, H.4-B, H.7, H.7-A, and H.9), and 24 months of experience as an immunoassay and clinical chemistry hardware specialist (Parts H.10, H.10-A, and H.10-B). At Part H.8, the labor certification indicates that no alternate combination of education and experience is acceptable. Part H.14 of the labor certification ("Specific skills or other requirements") states, in part: "[the Petitioner] will accept educational equivalency evaluation prepared by qualified evaluation service or in accordance with 8 CFR § 214.2(h)(4)(iii)(D)."[2] The Petitioner stated at Part J of the labor certification that the Beneficiary's highest level of education relevant to the job opportunity is a bachelor's degree in computer science and engineering from [redacted] University in Brazil, completed in 2004.

[1] The priority date of the petition is September 7, 2018.

[2] The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D), which is applicable to the H-1B nonimmigrant classification, provides several options for equivalency to completion of a college degree, including certain credentials evaluations; results of college-level equivalency examinations or special credit programs; certification or registration from certain professional associations; and a determination that the equivalent of a degree has been acquired through a combination of education, specialized training, and/or work experience.

Although the Petitioner stated at Parts H.4 and H.9 that a U.S. bachelor's degree or a foreign equivalent degree is required for the offered position and indicated at Part J.11 of the labor certification that the Beneficiary has the required degree, the record reflects that the Beneficiary's Brazilian diploma is not the foreign equivalent of a U.S. bachelor's degree. An evaluation of the Beneficiary's education and experience in the record indicates that the Beneficiary's diploma in hardware support and analysis from [redacted] University in Brazil is equivalent to two and one-half years of undergraduate coursework in computer science and engineering at a regionally accredited university, and that the combination of this education and his work experience is equivalent to a bachelor's degree in computer science and engineering from a regionally accredited undergraduate-level program or institution in the United States.

As the Petitioner indicated at Part H.8 of the labor certification that it will not accept an alternate combination of education and experience as fulfilling the minimum education requirement, the Director determined that the Beneficiary did not meet the requirements for the position as stated on the labor certification. The Petitioner has consistently contended that Part H.14 of the labor certification indicates that a combination of experience and education would be sufficient to satisfy the minimum requirements of the position and that it provided evidence that the Beneficiary's qualifications satisfy this alternate requirement.

In dismissing the Petitioner's appeal and two subsequent motions, we have considered the Petitioner's legal arguments, as well as additional evidence submitted in support of the Petitioner's motion to reopen, which included evidence of its recruitment efforts. Our prior decisions are part of the record of proceeding and are incorporated here by reference. Consistent with the Director's decision, we have concluded that the labor certification, when viewed as a whole, indicates that the position requires a U.S. bachelor's degree or foreign equivalent degree as a minimum education requirement, and that the Beneficiary does not possess such a degree. In our immediate prior decision dismissing the Petitioner's motion to reconsider, we concluded that the Petitioner did not establish, as required by 8 C.F.R. § 103.5(a)(3), that we incorrectly applied the law or USCIS policy in our decision dismissing its initial combined motions to reopen and reconsider. Rather, we determined that the Petitioner's motion to reconsider reiterated legal arguments and cited to non-binding authorities that we had previously reviewed and addressed in our two prior decisions.[3]

B. Motion to Reconsider

In support of this motion to reconsider, the Petitioner submits a brief and copies of its previously filed appeal and motions. The newly submitted brief is substantially similar in content to the brief provided in support of its two prior motions to reconsider. The Petitioner objects to the denial of the petition and subsequent dismissals of its appeal and motions, claims that the Beneficiary is eligible for the

[3] Throughout these proceedings, the Petitioner has consistently cited to a non-precedent AAO decision from 2007 and a document titled "NSC Liaison Committee I-140 Practice Tips and Updates," dated February 2007, which represents a compilation of notes from American Immigration Lawyers Association meetings and teleconferences with staff from the USCIS Nebraska Service Center. The AAO decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). In addition, we have previously distinguished the facts of that case from those presented in this matter. Similarly, unpublished agency decisions and legal opinions are not binding, even when they are published in private publications or widely circulated. *R.L. Inv. Ltd. Partners v. INS*, 273 F.3d 874 (9th Cir. 2001).

requested classification, and asserts that approval of the petition is warranted based on the evidence of record if we apply the appropriate preponderance of the evidence standard. The Petitioner does not, however, provide reasons for reconsideration or demonstrate that we misapplied the law or USCIS policy in our dismissal of its most recent motion to reconsider.

In fact, the Petitioner's brief in support of this motion contains few references to our decision dated July 19, 2022. Merely expressing disagreement with an adverse decision is not sufficient to meet the requirements of a motion to reconsider under 8 C.F.R. § 103.5(a)(3). *See Matter of O-S-G-,* 24 I&N Dec. 56, 58 (BIA 2006) (finding that a motion to reconsider is not a process by which the party may submit in essence, the same brief and seek reconsideration by generally alleging error in the prior decision). Rather, the moving party must demonstrate that the immediate prior decision was based on an incorrect application of law or USCIS policy. Here, the Petitioner's motion to reconsider does not meet the requirements stated at 8 C.F.R. § 103.5(a)(3). Accordingly, we will dismiss the motion. We will nevertheless revisit some of the Petitioner's arguments below.

The Petitioner once again asserts that "the AAO has placed a great deal of emphasis on Part H.8 of ETA Form 9089 but willfully ignores the plain language of Part H.14 despite that the USCIS may not ignore a term of the labor certification, nor may it impose additional requirements." The Petitioner's contention that we have "willfully ignore[d]" the language at Part H.14 of the labor certification is not persuasive. We have consistently acknowledged and addressed the Petitioner's statement at H.14 that it "will accept educational equivalency evaluation prepared by qualified evaluation service or in accordance with 8 CFR § 214.2(h)(4)(iii)(D)." However, we have also consistently determined that Part H.8 is the appropriate location on the labor certification for an employer to identify any alternative minimum education and experience requirements that it will accept, and the Petitioner has not established how we erred by reaching that conclusion. It asserts that a statement of alternative requirements at Part H.14 is "equally substantial," but has not explained why it stated no acceptable alternate combination of education and experience at Part H.8 of the labor certification where such information is expressly requested.

Further, the Petitioner represented and attested at Part J.11 of the labor certification that the Beneficiary has a foreign bachelor's degree in computer science and engineering from [redacted] University completed in 2004, but as noted, the record indicates that his diploma from that university is equivalent to only two and one-half years of undergraduate study at a U.S. institution. The Petitioner also marked "N/A" at Part J.19 in response to the question "Does the alien possess the alternate combination of education and experience as indicated in question H.8.?" This response may have been appropriate based on the Petitioner's decision to list no alternate combination of education and experience as acceptable at Part H.8. Nevertheless, the record reflects that the Beneficiary does not meet the primary minimum education requirement of a U.S. bachelor's degree or its foreign equivalent. While the language at Part H.14 seems to indicate that the Petitioner would accept less than a bachelor's degree or its foreign academic equivalent, the labor certification, as completed by the Petitioner at Parts H.4, H.9, J.11 and J.19, did not inform DOL that the Beneficiary lacks the primary minimum education requirement qualifications as stated on the Form ETA 9089.

The Petitioner asserts that we have erred by continuing to dismiss the value of a non-precedent AAO decision and agency opinion from 2007, noting that it "stretches the bounds of reason to limit the application" of such instructive guidance to future adjudications involving similar facts. However, we

have already thoroughly addressed why the 2007 documents on which the Petitioner sought to rely do not bind USCIS in this matter. The Petitioner's disagreement with our appropriate treatment of non-binding authorities does not provide proper cause for the reconsideration of our prior decision.

Finally, the Petitioner reiterates its prior position that this office "clearly has taken the position that the standard for review amounts to beyond a reasonable doubt." We addressed the appropriate standard of proof in our immediate prior decision, in which we observed that USCIS is required to approve an employment-based immigrant visa petition only where it is determined that the facts stated in the petition, which incorporates the labor certification, are true and the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b). In dismissing the appeal and subsequent motions, we have investigated the facts of the petition and the required labor certification and determined that the Beneficiary is not eligible for the benefit sought, because he does not possess a U.S. bachelor's degree or foreign equivalent degree as required by the labor certification. The Petitioner has not established how this determination amounts to modifying the standard of proof from the applicable preponderance of the evidence standard.

## III. CONCLUSION

For the reason discussed, we conclude that the Petitioner has not shown proper cause for reconsideration of our prior decision. As the motion does not meet all the requirements of a motion to reconsider, it must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4).

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