U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF [redacted]

DATE: APR. 12, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, PETITION FOR ALIEN WORKER

The Petitioner, a state public school system, seeks to permanently employ the Beneficiary as a secondary school science teacher in accordance with section 203(b)(2) of the Immigration and Nationality Act (the Act). This second preference employment-based classification makes immigrant visas available to advanced degree professionals or individuals who possess exceptional ability, whose services are sought by an employer in the United States.

The Director of the Nebraska Service Center denied the petition[1], concluding that the petition did not meet the requirements for the second preference classification. The petition is supported by an Application for Permanent Employment Certification, ETA Form 9089, certified by the U.S. Department of Labor (DOL). The Director determined that the Form ETA 9089 did not demonstrate that the position requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability. Therefore, he found that the Beneficiary was not eligible for the second preference classification.[2] *See* 8 C.F.R. § 204.5(k)(4).

On appeal, the Petitioner maintains that the position requires an individual who possesses exceptional ability by virtue of implied position requirements beyond those expressly stated on the ETA Form 9089. We disagree.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

[1] The Director first denied the petition in December 2015. The Petitioner filed an appeal of that decision in January 2016. The Director then issued a second denial in May 2016, contrary to the requirements set forth at 8 C.F.R. § 103.3(a)(2)(iv) that an appeal shall be forwarded to our office if the Director determines that a favorable decision is not warranted. The Petitioner filed a second appeal in June 2016, and the Director ultimately forwarded the petition and appeal to us for consideration.

[2] USCIS previously approved a petition for this Beneficiary under the third preference classification based upon the position offered to her in this petition. Section 203(b)(3)(A)(ii) of the Act grants third preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also,* 8 C.F.R. § 204.5(l)(2).

Section 203(b)(2) of the Act provides classification to qualified individuals who are members of the professions holding advanced degrees or their equivalent, or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The implementing regulation at 8 C.F.R. § 204.5(k)(2) states: "Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." Unless seeking a waiver in the national interest, the petition must be accompanied by a valid, individual labor certification or an application for Schedule A delegation that demonstrates the job requires an advanced degree or an individual of exceptional ability. 8 C.F.R. § 204.5(k)(4)(i).

Further, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, arts, or business. This, however, is only the first step, and the successful submission of evidence meeting at least three criteria does not, in and of itself, establish eligibility for this classification.[3] If the petitioner submits sufficient evidence at the first step, we will then go on to determine whether the evidence in its totality shows that the beneficiary is an alien of exceptional ability. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality").

II. ANALYSIS

It is important to discuss the respective roles of DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the ETA Form 9089 in this matter is certified by DOL. It is DOL's responsibility under section 212(a)(5)(A)(i) of the Act to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is significant that none of the inquiries assigned to DOL under the Act or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the beneficiary are qualified for a specific employment-based visa preference classification. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

[3] *Cf. Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a similar two-part framework relating to aliens of "extraordinary ability" where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination).

A. Beneficiary's Qualifications for the Second Preference Category

On the ETA Form 9089, Part H, the Petitioner indicated that the minimum education level for the position is a bachelor's degree in education, science or a related field. The Petitioner further indicated that experience in the position offered was not required, and that an alternate combination of experience and education would not be acceptable. The only other requirement specified on the form was eligibility for a [redacted] state teaching license. Accordingly, the petitioner defined the requirement for the position as a bachelor's degree in education, science, or a related field, and eligibility for licensure as a teacher in [redacted], the location of the employment.

The material provided in the record reflects that the Beneficiary earned a doctoral degree in education from [redacted] in 2003, several years before the filing of the ETA Form 9089 on February 23, 2006. Additionally, she has held a [redacted] teaching license since 2004. Therefore, she met the requirements for the position at the time her priority date was established for an immigrant visa. *See* 8 C.F.R. § 204.5(d). She also met the definition of an advanced degree professional under the second preference classification.[4] Therefore, the remaining issue before us is whether the position itself qualifies for this classification.[5]

B. Qualifying Position for the Second Preference Classification

Since the ETA Form 9089 only requires a bachelor's degree and eligibility for a teaching license, the job offered to the Beneficiary does not meet the second preference requirements as a position for an advanced degree professional. Therefore, the Petitioner must demonstrate that the position offered in the ETA Form 9089 requires the equivalent of an alien of exceptional ability. *See* 8 C.F.R. § 204.5(k)(2) and 8 C.F.R. § 204.5(k)(4)(i).

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) contains an evidentiary framework that must be met to establish eligibility for second preference status as an alien of exceptional ability. Six evidentiary criteria are set forth at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F), and encompass things like academic degrees, work experience and licensure in the area of specialty, high compensation relative to others working in the field, membership in professional associations, or recognition for achievements or significant contributions to the field.

As an initial step, the Petitioner must provide satisfactory evidence that the position offered in the ETA Form 9089 requires at least three of those six criteria. If the Petitioner submits sufficient evidence at the first step, we will then go on to determine whether the evidence in its totality shows that the position offered is equivalent to an alien of exceptional ability. In this case, the Petitioner

[4] The Petitioner maintains that the Beneficiary is also eligible for the second preference classification as an alien of exceptional ability. As she possessed a doctoral degree in education at the time of filing of the ETA Form, a determination regarding whether she is an alien of exceptional ability is moot. She meets the statutory and regulatory definition of "advanced degree professional". *See* section 203(b)(2)(A) of the Act and 8 C.F.R. § 204.5(k)(2).

[5] The Petitioner has established its continuing ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

has not established that the position meets at least three of the criteria. The Petitioner highlights the Beneficiary's academic accomplishments and level of compensation, and contends that an analysis of her qualifications is a reasonable basis for determining whether the position itself requires the equivalent of an alien of exceptional ability. However, for the classification at issue, the job offer portion of the ETA Form 9089 must demonstrate that the job requires the equivalent of an alien of exceptional ability. *See* 8 C.F.R. § 204.5(k)(4)(i).

The ETA Form 9089 requires a bachelor's degree in education, science or a related field and so meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A). However, as a prospective applicant only needs to be eligible to obtain a [redacted] teaching license to meet the requirements of the ETA Form 9089, and does not need to have possessed a teaching license at the time the priority date was established, the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) has not been met.

The proffered wage of $41,172 for the position was based upon a collective bargaining agreement for teachers working in [redacted], and has not been shown to be a level of compensation that is high relative to others working in the occupation in [redacted]. The ETA Form 9089 specified that the wage might also be as high as $67,637. While an applicant for the position may be offered a higher salary, the minimum wage of $41,172 matches the form's prevailing wage. The Petitioner has not demonstrated that tendering the prevailing wage indicates that the job requires an individual of exceptional ability. Therefore, the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) has not been met.

The Petitioner contends that the position meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E), noting that membership in the [redacted] is a "subsumed" requirement of the teaching position in the ETA Form 9089. However, no mention of this position requirement is expressly made on the form. When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1015 (D.C. Cir. 1983). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* USCIS cannot require evidence of [redacted] membership in order to establish the Beneficiary's eligibility for this position as it was not specified on the ETA Form 9089. Similarly, the Petitioner may not rely on position requirements that are not documented on ETA Form 9089 in order to demonstrate that the position offered meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Petitioner did not provide discussion or material to show that the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) or (F) have been met. As the evidence of record does not show that the requirements of the position meet at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), we will not go on to the next step to determine whether the evidence in its totality shows that the position offered is equivalent to an alien of exceptional ability. Rather, we conclude that the position does not meet the requirements of 8 C.F.R. § 204.5(k)(4)(i).

III. CONCLUSION

The Petitioner has not demonstrated that the job requires an individual of exceptional ability. Accordingly, the Beneficiary is not qualified for the second-preference visa classification based on this petition. Therefore, the Beneficiary is ineligible for immigration benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of* [redacted], ID# 276806 (AAO Apr. 12, 2017)