U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-S- INC

DATE: MAR. 28, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an engineering consultation business, seeks to employ the Beneficiary as an applications engineer. It requests classification of the Beneficiary as an advanced degree professional under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition on the ground that the minimum educational and experience requirements of the labor certification did not support the requested classification of advanced degree professional. We dismissed the Petitioner's appeal on the same ground, and on the additional ground that the evidence of record did not establish that the Beneficiary met the experience requirement of the labor certification.

The case is now before us on a motion to reconsider. The Petitioner asserts that our dismissal of the appeal was erroneous because the terms of the labor certification are not controlling in the adjudication of the petition and the actual minimum requirements of the proffered position qualify it for advanced degree professional classification. The Petitioner also asserts that our decision not to approve the petition for the alternative classification of professional was erroneous, and that there was no legal basis for our finding that confirmation of the Beneficiary's work with a prior employer was required.

Upon review, we will deny the motion.

I. REQUIREMENTS OF A MOTION TO RECONSIDER

A motion to reconsider must establish that our decision was based on an incorrect application of law or 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). A motion to reconsider must be supported by any pertinent precedent or adopted decision, a statutory or regulatory provision, or a statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security (DHS) policy. *Id.* We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

A. Labor Certification is Controlling with Regard to Requirements of Proffered Position

The Petitioner asserts that we and the Director misstated applicable case law in our decisions. According to the Petitioner, *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986); *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1986); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); and *Rosedale and Linden Park Co. v. Smith*, 595 F.Supp. 829 (1984), all leave USCIS free to determine the requirements of a proffered position regardless of what the labor certification states. The Petitioner contends that USCIS is not bound by a labor certification and may consider other information outside the labor certification in determining what the requirements of a proffered position are, and whether the beneficiary meets them. The Petitioner misinterprets the cited decisions and misconstrues our prior decision(s).

While it is true that USCIS is responsible for determining whether a beneficiary meets the minimum requirements for a proffered position, those requirements are set for any given employment-based immigrant petition in the labor certification that accompanies it. With regard to petitions for advanced degree professional classification, the regulation at 8 C.F.R. § 204.5(k)(4)(i) expressly provides that "[t]he job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent . . . ." As stated in our previous decision, "advanced degree" is defined in the regulation at 8 C.F.R. § 204.5(k)(1), in pertinent part, as "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." Under the applicable regulations, therefore, the job offer portion of a labor certification submitted to USCIS with a petition for advanced degree professional classification must demonstrate that the job requires either (1) a U.S. master's or foreign equivalent degree, or (2) a U.S. baccalaureate or foreign equivalent degree plus five years of qualifying experience. In this case, however, the labor certification only requires a U.S. baccalaureate or foreign equivalent degree plus one year of qualifying experience. Since this combination of education and experience does not meet the definitional requirement of an "advanced degree," the labor certification does not support the petition's requested classification of advanced degree professional.[1]

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[1] The Petitioner contends that we misstated the evidence it submitted from other companies of their job requirements for applications engineers by stating in a footnote that three out of the four job advertisements do not require at least a master's degree or a bachelor's degree and five years of experience. The Petitioner is mistaken. The advertisement from Aerotek in Huntington Beach, California, requires an "[e]ngineering degree **and/or** [emphasis added] 5+ years [of] aerospace structures experience." This language would allow an applicant to qualify for the job with five years of experience alone, without any degree. The advertisement from Atlas Copco in Houston, Texas, requires a "[f]our year degree in Industrial or Mechanical Engineering, Business or Technical Field **or equivalent work experience** [emphasis added]" and "5+ years of a technical role within a municipal environment." Since "equivalent work experience" could substitute for a bachelor's degree, an applicant could qualify for this job without a degree of any kind. The advertisement from Adecco Engineering & Technology in Morrisville, North Carolina, requires a "[b]achelor['s] degree in Engineering or technology discipline **or**

The Petitioner also asserts that we ignored section 22.2(b)(3) of the Adjudicator's Field Manual (AFM) in our decision, and quotes a section thereof which confirms that the Department of Labor (DOL) does not generally review a beneficiary's qualifications in the labor certification process and that USCIS does do that in adjudicating the petition. The Petitioner has not explained in what way we ignored the cited section of the AFM. The cited section speaks to USCIS' authority to determine whether a beneficiary is qualified for the offered position. As discussed in the next section, we agree that this responsibility rests with USCIS and we have reviewed the Beneficiary's qualifications in regards to eligibility for the offered position. However, the issue here is that the position described on the labor certification, which was certified by DOL does not support classification as an advanced degree professional. The evaluation of the position requirements and the evaluation of the Beneficiary's qualifications, are separate issues. Here the labor certification clearly states that the proffered position only requires a bachelor's degree and one year of experience. As such, the proffered position is not eligible for advanced degree classification. The Petitioner further contends that it does not employ any applications engineers with less than five years of experience, and submits a company profile highlighting its employees' experience (though not their educational credentials) in applications engineering. The experience of the Petitioner's employees, however, does not alter the fact that the position described on the labor certification, which was certified by DOL, requires only one year of experience.

The Petitioner again complains that USCIS did not issue a request for evidence (RFE) or a notice of intent to deny (NOID) before the Director issued the decision denying the petition. However, as explained in our prior decision, the regulation at 8 C.F.R. § 103.2(b)(8)(i) states that "[i]f the record evidence establishes ineligibility, the benefit request will be denied on that basis." The regulations do not require USCIS to issue an RFE or a NOID if the record indicates that a basic element of eligibility has not been met. *See* 8 C.F.R. § 103.2(b)(8)(ii). In the present case, the initial evidence indicated that the Petitioner was ineligible for the requested classification of advanced degree professional because the minimum requirements for the job opportunity, as stated in the labor certification that accompanied the petition, were less than an advanced degree. Accordingly, the denial without an RFE or a NOID was appropriate.

Finally, the Petitioner asserts once again that the petition should be approved for the alternative classification of "EB-3" professional because the Beneficiary has the requisite educational degree and qualifying experience to meet the terms of the labor certification and qualify for professional classification under section 203(b)(3)(A)(ii) of the Act. A petition may only be approved, however, for the classification requested on the petition, which in this case is advanced degree professional. A petitioner may not make a material change to a petition on appeal in an effort to cure a deficiency and make it approvable. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). The

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an equivalent combination o[f] training, education, and experience [emphasis added]" and "at least five years of experience as an Applications Engineer." Since "an equivalent combination of training, education, and experience" could substitute for a bachelor's degree, an applicant could qualify for this job as well without a degree of any kind. Thus, we correctly indicated in our previous decision that the evidence submitted does not support the contention that the applications engineer positions submitted required at least a bachelor's degree and five years of experience. Moreover, and most importantly, the requirements of the labor certification, not the requirements of similar positions as noted in job advertisements, are controlling in our determination of whether the labor certification supports the petition's requested classification.

Petitioner claims that our citation of this decision was improper because it involved facts that came into being after an initial decision was made on the petition. The Petitioner asserts that *Matter of Izummi* is distinguishable from the instant case because all the facts in this proceeding were presented to USCIS before the Director's decision. However, in this case, the Petitioner sought to change the requested classification *after* the Director has issued his decision, in order to cure the deficiency identified by the Director. As such, *Matter of Izumi* is applicable here. If the Petitioner wishes to change the classification request to professional, a new petition is the proper avenue.

B. Evidentiary Requirement for Experience

The Petitioner asserts that we erred in finding that the record did not establish that the Beneficiary met the one-year experience requirement of the labor certification because no letter had been submitted from the Beneficiary's alleged employer, [redacted] of [redacted] Indiana. The labor certification claimed that the Beneficiary was employed by this company from May 2014 through August 2015, but there was no corroborating documentation in the record. The Petitioner complains that we did not cite any legal authority for the requirement of a letter from the Beneficiary's former employer to confirm that he actually worked there in the job capacity alleged. The pertinent legal authority is the regulation at 8 C.F.R. § 204.5(g)(1), which provides that evidence of qualifying experience for employment-based immigration classifications "shall be in the form of letter(s) from current or former employer(s) . . . and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien . . ."

Thus, the Petitioner is clearly required by regulation to submit a letter from [redacted] to corroborate the Beneficiary's claimed employment, or if such a letter is unavailable, to submit other documentation related to the Beneficiary's experience. As no corroborating evidence of the claimed employment was submitted, our prior decision finding that the record did not establish the Beneficiary's qualifications for the offered position, was correct.

III. CONCLUSION

The Petitioner has not established that our previous decision was based on any incorrect application of law or USCIS/DHS policy. The Petitioner has not shown proper cause for reconsideration and has not overcome the grounds for dismissal of its appeal. Therefore, the motion to reconsider will be denied for the reasons discussed above, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The motion to reconsider is denied.

Cite as *Matter of D-S- Inc.*, ID# 3427238 (AAO Mar. 28, 2019)