U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-I-C-

DATE: OCT. 1, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a business engaged in the precision machining of industrial parts, seeks to employ the Beneficiary as an accountant. 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 visa classification of advanced degree professional.

On appeal the Petitioner asserts that the Director should have determined whether the proffered position requires an advanced degree and whether the classification requested on the petition was proper and reasonable notwithstanding the minimum requirements of the labor certification. The Petitioner also asserts that it should have been given the opportunity to change its requested visa classification or to explain the discrepancies between the minimum requirements of the labor certification and its visa classification request.

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

I. LAW

A. Employment-Based Immigrant Petition Process

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). 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 U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration

Services (USCIS).[1] *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national 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.

B. Advanced Degree Professional Classification

A petition for an advanced degree professional must generally be accompanied by a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(1). The regulations state that to be eligible for the requested classification, the job offer portion of the labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent. 8 C.F.R. § 204.5(k)(4)(i). The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means 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. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

If the labor certification requirements allow for less than an advanced degree, therefore, the position will not qualify for advanced degree professional classification.

II. ANALYSIS

There are two basic issues on appeal: (1) whether the labor certification requirements for the proffered position support the request for advanced degree professional classification; and (2) if they do not, whether the Petitioner may change its classification request to accommodate the labor certification.

A. Labor Certification Requirements Do Not Support Advanced Degree Professional Classification

In determining whether the position offered qualifies for advanced degree professional classification, we look to the terms of the labor certification. The education, training, experience, and other requirements for the proffered position are set forth in Part H of the labor certification. In this case Part H states that the proffered position of accountant has the following requirements:

4.	Education: Minimum level required:	Bachelor's degree
4-B.	Major Field of Study:	Accounting
5.	Is training required in the job opportunity?	No
6.	Is experience in the job offered required?	No

[1] The "priority date" of the petition is the date the underlying labor certification application was filed with the DOL. *See* 8 C.F.R. § 204.5(d). In this case the priority date is January 24, 2018. The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

7.	Is an alternate field of study acceptable?	Yes
7-A.	What field(s) of study?	Business Administration with concentration in Accounting
8.	Is an alternate combination of education and experience acceptable?	No
9.	Is a foreign educational equivalent acceptable?	Yes
10.	Is experience in an alternate occupation acceptable?	No
14.	Special skills or other requirements:	None

In order to determine what a job opportunity requires, we must examine "the language of the labor certification job requirements." *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the alien employment certification application form. *Id.* at 834. Moreover, we read the labor certification as a whole to determine its requirements. "The Form ETA 9089 is a legal document and as such the document must be considered in its entirety." *Matter of Symbioun Techs., Inc.*, 2010-PER-10422, 2011 WL 5126284 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the labor certification clarified an employer's minimum job requirements).[2]

In this case, the plain language of the labor certification makes clear that the minimum educational requirement for the job of accountant is a bachelor's degree in accounting or business administration and that there is no minimum experience requirement. In his decision the Director indicated that the labor certification did not support the requested classification of advanced degree professional because it did not require either a master's degree or a bachelor's degree and five years of qualifying experience, which are the minimum alternative requirements for that classification as defined in 8 C.F.R. § 204.5(k)(4)(i).

On appeal the Petitioner asserts that the Director should have determined whether the proffered position requires an advanced degree and whether the classification requested on the petition was proper and reasonable notwithstanding the minimum requirements of the labor certification. We disagree. In order to determine eligibility for the requested classification, USCIS determines whether the proffered position's minimum requirements, as stated in the labor certification, comport with the requirements of the requested classification. In making that determination, USCIS is bound by the terms of the labor certification. *See Madany v. Smith*, 696 F.2d at 1015, *see also Rosedale Linden Park Company v. Smith*, 595 F. Supp. at 833-34. In this case the labor certification requires only a bachelor's degree, which is less than the minimum alternative requirements – either a master's degree or a bachelor's degree and five years of qualifying experience – specified in the definition of advanced degree professional at 8 C.F.R. § 204.5(k)(2). Thus, the minimum requirements of the labor certification do not support the requested classification of advanced degree professional.

[2] Although we are not bound by decisions issued by the Board of Alien Labor Certification Appeals, we may nevertheless take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

B. Change of Classification Cannot be Considered for this Petition

The Petitioner asserts that it should have been given the opportunity to change its requested visa classification or to explain the discrepancies between the minimum requirements of the labor certification and its visa classification request. The Petitioner cites an excerpt from the USCIS standard operating procedures (SOPs) for Form I-140 petitions regarding changes to requested classifications, which the Petitioner quotes as follows:

> Pursuant to Opportunity for Certain Employment Based Petitioners to Change their Requested Classification [CSC 70/6], if after review, it is determined that the petitioner is requesting a classification for which the beneficiary clearly does not qualify, but the beneficiary appears to qualify for another classification, the petitioner may be offered the opportunity to change to a new classification. A RFE [Request for Evidence] may be used for this purpose . . . .

I-140 National SOP-Section 5 – Adjudication Module. The AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the federal circuit court of appeals from whatever circuit that the action arose, but not by unpublished decisions or internal memoranda and operating procedures. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated); *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely."). Moreover, the SOP quoted above has no bearing in this proceeding because it is the requirements of the job, not the Beneficiary's qualifications, which are at issue.

The Petitioner also cites the regulation at 8 C.F.R. § 103.2(b)(16)(i), entitled "Derogatory information unknown to petitioner or applicant," which provides as follows:

> If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] 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 . . . .

This provision likewise has no bearing in this proceeding because the Petitioner has not identified any derogatory information known only to USCIS before the Director's decision. The mismatched minimum requirements of the labor certification and the visa classification request were fully known to the Petitioner from the time the petition was filed until the Director's decision was issued five months later. Thus, there is no basis in the above regulation to claim that the Director should have solicited rebuttal information from the Petitioner before denying the petition. Furthermore, while the USCIS website currently states that a request to change the visa category designated on a Form I-140

petition may be granted to correct a clerical error, it also advises petitioners that "[w]e cannot change the visa category if we have already made a decision on your Form I-140." https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker (last accessed Sept. 16, 2019). Here, the Petitioner did not request to change classification until filing the appeal.

III. CONCLUSION

The labor certification does not support the requested classification of advanced degree professional because it does not require at least a master's degree or a bachelor's degree followed by five years of qualifying experience. The appeal will be dismissed for the above stated reasons, 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 appeal is dismissed.

Cite as *Matter of A-I-C-*, ID# 5917476 (AAO Oct. 1, 2019)