U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20511744

Date: JULY 12, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as its financial controller. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based 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, concluding that the record did not establish that the labor certification supports the second preference immigrant classification, as requested. The Petitioner subsequently filed a combined motion to reopen and motion to reconsider, which the Director dismissed. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the employment of a noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *Id*.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a noncitizen may finally 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.

The term "advanced degree" is defined in the regulation at 8 C.F.R. § 204.5(k)(2) 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 the labor certification requirements allow for less than an advanced degree, the position will not qualify for advanced degree professional classification.

II. ANALYSIS

On the Form I-140, Immigrant Petition for Alien Workers, the Petitioner indicated that it filed the petition for "[a] member of the professions, holding an advanced degree or an alien of exceptional ability (who is not seeking a National Interest Waiver (NIW))." The Petitioner's human resources director furthermore signed a certification on the Form I-140, attesting in relevant part, "I have reviewed this petition, I understand all of the information contained in, and submitted with, my petition, and all of this information is complete, true, and correct." *See* 8 C.F.R. § 103.2(a)(2). Part H.4 of the DOL ETA Form 9089, Application for Permanent Employment Certification, submitted with the Form I-140 indicates that the minimum level of education required for the position is a bachelor's degree in management, finance, or business administration and Part H.6-A indicates that 36 months of experience in the specialty also is required for the job. Part H.14 reiterates those requirements.

The Director noted the job requirements provided on the ETA Form 9089 and further noted that the second preference classification requested on the Form I-140 requires a master's degree or a bachelor's degree with five years of progressive experience in the specialty. *See* 8 C.F.R. § 204.5(k)(3)(i). The Director also noted that "no representations have been made that the [B]eneficiary has exceptional ability." *See* section 203(b)(2) of the Act. The Director then concluded that, because the Petitioner did not seek classification of the Beneficiary as an individual of exceptional ability, and because the ETA Form 9089 requires less than five years of progressive experience in the specialty, the labor certification does not support the advanced degree professional immigrant classification requested on the Form I-140.

On a combined motion to reopen and motion to reconsider before the Director, the Petitioner requested to change the visa classification and asserted that "[U.S. Citizenship and Immigration Services (USCIS)] was correct in its assessment of the state of the evidence, but it should not have denied the case without giving the [P]etitioner the opportunity to correct an innocent mistake in the record." In support of the motion to reopen, the Petitioner submitted a one-page excerpt of a Form I-140, indicating that the excerpt would be for "[a] professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree)." Also in support of the motion to reopen, the Petitioner submitted a signed declaration from an attorney for the Petitioner asserting, in relevant part, that the "cover letter and the letter in support from [the P]etitioner clearly states our intention to file this as an EB-3 matter." We note that the cover letter prepared by the law firm refers to the petition twice as an EB-3; however, the record does not contain a letter in support from the Petitioner that indicates whether the requested classification is either EB-2 or EB-3. In support of the

motion to reconsider, the Petitioner asserted that the Director misapplied USCIS Policy Alert PA-2021-11 "Requests for Evidence and Notices of Intent to Deny," regarding the issuance of requests for evidence (RFEs) and notices of intent to deny (NOIDs). The Director dismissed the combined motion, citing *Matter of Izummi*, 22 I&N Dec. 159 (Assoc. Comm'r 1998), noting that "a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements," and concluding that the Petitioner had not satisfied motion filing requirements.

On appeal, the Petitioner reasserts that USCIS Policy Alert PA-2021-11 "Requests for Evidence and Notices of Intent to Deny" required the Director to have sent an RFE or NOID rather than denying the petition and dismissing the combined motion because the labor certification does not support the immigrant classification requested on the Form I-140. The policy alert referenced by the petitioner corresponds to revisions to Volume 1, Part E, Chapters 6 and 9 of the USCIS Policy Manual, effective June 9, 2021. 1 *USCIS Policy Manual* E.6; E.9, https://www.uscis.gov/policymanual. The Petitioner's reliance on the policy alert and the revisions to the USCIS Policy Manual is misplaced. The USCIS Policy Manual states, "USCIS has the discretion to deny a benefit request without issuing an RFE or NOID." *Id.* at E.6(F); *see also* 8 C.F.R. § 103.2(b)(8)(ii). The USCIS Policy Manual further states, "If the officer determines a benefit request does not have any legal basis for approval, the officer should issue a denial without prior issuance of an RFE or NOID." *Id.* at E.6(F); *see also id.* at E.9.

As noted above, on the Form I-140, the Petitioner requested classification of the Beneficiary as "[a] member of the professions, holding an advanced degree or an alien of exceptional ability (who is not seeking a National Interest Waiver (NIW))." However, the ETA Form 9089 submitted with the Form I-140 indicates that a bachelor's degree in management, finance, or business administration, with 36 months of experience in the specialty, is required for the job, which is less than the minimum requirements for a member of the professions holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(3)(i). Therefore, the labor certification does not support the immigrant classification requested on the Form I-140, and the petition did not have any legal basis for approval. The Director was not required to issue an RFE or NOID before denying the petition and dismissing the motion to reconsider. *See* 1 *USCIS Policy Manual, supra*, at E.6(F); E.9; *see also* Section 291 of the Act (providing that petitioners, not USCIS, bear the burden of establishing eligibility for requested benefits); 8 C.F.R. §§ 103.2(b)(8)(ii), 103.5(a)(3); *Matter of Izummi*, 22 I&N Dec. at 175.

The Petitioner also asserts on appeal that *Matter of Izummi* does not apply to the Petitioner's request to change the immigrant classification sought after the Director denied the petition because, unlike in *Matter of Izummi*, in this case "the [B]eneficiary was eligible for approval but for the mistakenly checked box." Contrary to the Petitioner's assertion, *Matter of Izummi* applies to this case. This petition is not approvable because the labor certification does not support the immigrant classification requested on the Form I-140. Thus, the Beneficiary is not eligible for the benefit requested without a change of material facts – namely, the visa classification selection on the Form I-140. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification, once the decision has been rendered. Accordingly, the Director was not required to grant the Petitioner's request to change the immigrant classification sought, after the date of the petition's adverse decision. Doing so would change material facts regarding the petition. *See* 8 C.F.R. §§ 103.2(b)(1), 103.5(a)(2); *see also Matter of Izummi*, 22 I&N Dec. at 175 (citing *Matter of Katigbak*,

14 I&N Dec. 45, 49 (Comm. 1971) ("A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts").[1]

III. CONCLUSION

The record does not establish that, at the time of filing, the labor certification supported the second preference immigrant classification, as requested. *See* 8 C.F.R. §§ 103.2(b)(1), 204.5(k)(3)(i).

ORDER: The appeal is dismissed.

[1] We note that USCIS' website indicates that USCIS allows a classification change only before the issuance of a decision. A petitioner may not use a single petition to seek approvals in multiple visa categories. USCIS, "Petition Filing and Processing Procedures for Form 1-140, Immigrant Petition for Alien Worker," https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker (last visited July 12, 2022). The website clearly advises that "[USCIS] cannot change the visa category if we have already made a decision on your Form I-140." *Id.* The website also advises petitioners to check their Form 1-140 receipt notices to ensure that the notices state correct immigrant categories and, if not, to call USCIS "immediately." *Id.* Here, the Petitioner does not submit evidence that a request to amend the petition was made before the decision was issued.