U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21900712

Date: OCT. 31, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner distributes used clothing and seeks to permanently employ the Beneficiary as a management analyst. The company requests his classification under the second-preference, immigrant visa category as a member of the professions holding an advanced degree or its equivalent. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition. We dismissed the Petitioner's appeal and the company's following two rounds of combined motions to reopen and reconsider. *See In Re: 18654918* (AAO Jan. 27, 2022). We concluded that the Petitioner did not demonstrate the Beneficiary's qualifying employment experience for the offered position or the requested immigrant visa classification. We also found the job requirements on the accompanying certification from the U.S. Department of Labor (DOL) insufficient to establish the job's need for an advanced degree professional.

The matter returns to us on another round of combined motions to reopen and reconsider. The Petitioner submits additional evidence and argues that, in finding insufficient proof of the job's need for an advanced degree professional, we imposed an "arbitrary interpretation" of the labor certification's requirements. Further, the company contends that we erred in assessing the Beneficiary's experience by mistaking his former U.S. employer for an affiliated company with similar legal and business names.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon review, we will dismiss the combined motions.

I. MOTION CRITERIA

A motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). In contrast, a motion to reconsider must demonstrate that our prior decision misapplied law or U.S. Citizenship and Immigration Services (USCIS) policy based on the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant motions that meet these requirements and demonstrate eligibility for the requested benefit.

II. THE REQUIRED EXPERIENCE

The Petitioner previously demonstrated the Beneficiary's possession of 14 of the required 60 months (five years) of full-time, qualifying experience as a management analyst. The company claims that he gained at least another 46 months of qualifying experience working as a management analyst at a U.S. ship chandlery between May 2005 and January 2010.

In our prior decision, we rejected the Petitioner's evidence of the Beneficiary's claimed experience at the chandlery. A former colleague of the Beneficiary testified to the chandlery's employment of him during the relevant period. Based on this evidence, we assumed the men worked for the same employer but noted that the federal employer identification number (FEIN) on an IRS Form W-2, Wage and Tax Statement, of the colleague during the period did not match the chandlery's FEIN of record. We found that the discrepant FEIN cast doubt on the chandlery's identity and the authenticity of the Petitioner's evidence of the Beneficiary's employment there. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring petitioners to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

On motion, however, the Petitioner submits evidence demonstrating that, although the companies shared similar names and common ownership, the Beneficiary and his colleague did not work for the same employer. Thus, a different entity with a different FEIN issued the Form W-2 to the Beneficiary's colleague. We therefore erred in finding discrepant FEINs and rejecting evidence of the Beneficiary's employment at the chandlery.

In a notice of intent to dismiss the motions, however, we also asked the Petitioner to resolve another evidentiary discrepancy. In separate filings during the proceedings, the company submitted copies of two versions of the Beneficiary's 2009 Form W-2. One stated his annual pay from the chandlery as $31,076; the other identified his receipt from the chandlery that year of $23,424.50. Further, although the forms listed the same FEIN for the chandlery and the same U.S. Social Security number for the Beneficiary, they stated different addresses for each party.

The Petitioner's response seeks to resolve the inconsistencies in the 2009 Forms W-2. Affidavits of the Beneficiary and the former president and employees of the chandlery state that the business hired a vendor to process its payroll for part of 2009. The vendor reportedly issued the Beneficiary's Form W-2 with the lesser wage amount, as the amount apparently excluded wages that the chandlery had directly issued to the Beneficiary that year. The Form W-2 reflecting the lesser amount also states the name of the vendor in small print. Some of the affiants say the chandlery issued the other Form W-2 showing the Beneficiary's correct pay total in 2009. These affiants acknowledge that, in past years, the chandlery informed payroll vendors of any inaccuracies in their Forms W-2. But, because another company acquired the chandlery in early 2010, it would no longer use the vendor's services. The chandlery therefore reportedly did not inform the vendor of the discrepancies in its 2009 Forms W-2.

The Petitioner also seeks to explain the inconsistent addresses on the 2009 Forms W-2. Documentary evidence indicates that, unlike the vendor's Form W-2, the 2009 form that the chandlery purportedly issued to the Beneficiary stated his most recent address. Further, online government information indicates the chandlery's use of both addresses listed for it on the 2009 Forms W-2.

The Petitioner's explanations, however, conflict with evidence that the business previously submitted. In response to the Director's notice of intent to dismiss the petition, the Petitioner provided copies of the chandlery's purported monthly "pay statements" to the Beneficiary in 2009, from January through December. Consistent with the Petitioner's explanation, the monthly pay amounts total $31,076. But all the pay statements identify the issuer as the chandlery. Unlike the 2009 W-2 listing the lesser amount or the Beneficiary's payroll records from 2007 and 2008, the name or logo of a payroll vendor does not appear on any of the 2009 statements. Thus, contrary to the Petitioner's explanation, the statements suggest the chandlery's processing of all the Beneficiary's pay in 2009. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record). The Petitioner's explanation therefore does not fully resolve the two Forms W-2 issued to the Beneficiary in 2009.

Also, all the 2009 pay statements list the Beneficiary's address as of that year's end. The Petitioner submitted evidence demonstrating that the Beneficiary moved to the address in the second half of the year. Thus, his later address on the earlier pay statements suggests their creation after the purported payments, casting doubt on their contemporaneousness and authenticity. *See Matter of Ho*, 19 I&N Dec. at 591 (holding that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence).

For the foregoing reasons, the Petitioner has not resolved evidentiary discrepancies regarding the Beneficiary's claimed experience with the chandlery. Thus, the record does not demonstrate his qualifying experience for the offered position and the requested immigrant visa category. We will therefore affirm the appeal's dismissal.

III. THE JOB'S NEED FOR AN ADVANCED DEGREE PROFESSIONAL

A labor certification accompanying a petition for an advanced degree professional "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 term "advanced degree" means a U.S. academic or professional degree or a foreign equivalent degree above that of a baccalaureate, or a U.S. bachelor's degree or a foreign equivalent followed by five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2).

For the offered position of management analyst, we found that language on the labor certification indicates the Petitioner's acceptance of less than a U.S. bachelor's degree or a foreign equivalent degree. The Petitioner contends that we misinterpreted the language and ignored evidence of the company's intent in drafting the wording, including affidavits of company officials and copies of recruitment materials for the offered position.

The labor certification states the primary minimum requirements of the offered position as a U.S. master's degree, or a foreign equivalent degree, in business administration, with no training or experience required. The Petitioner indicated that it would also accept an alternate combination of education and experience: a bachelor's degree followed by at least five years of progressive experience. The company seeks to qualify the Beneficiary for the offered position and requested immigrant visa category based on the alternate requirements.

To qualify as an advanced degree professional based on a bachelor's degree and five years of post-baccalaureate experience, a noncitizen must have a single degree that is or equates to a U.S. bachelor's

degree. "[B]oth the Act and its legislative history make clear that, . . . to . . . have experience equating to an advanced degree under the second [preference category], an alien must have at least a bachelor's degree." Final Rule for Immigrant Visa Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991). Regulations also require an advanced degree professional to have at least "*a* United States baccalaureate degree or *a* foreign equivalent degree." *See* 8 C.F.R. § 204.5(k)(3)(i)(B) (emphasis added).

In interpreting the job requirements on a labor certification, USCIS may neither ignore a term nor impose unlisted requirements. *See Madany v. Smith*, 956 F.3d 1008, 1015 (D.C. Cir. 1983) (stating that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original). Section H.14 of the Petitioner's labor certification - "Specific skills or other requirements" - states the company's acceptance of "a Bachelor's equivalent based on a combination of education as determined by a professional evaluation service." The plain language of this section allows the Petitioner's acceptance of a U.S. baccalaureate equivalency, if determined by a professional evaluation service, based on a combination of lesser degrees, such as two associate degrees. A combination of lesser degrees would not constitute a single-degree, baccalaureate equivalency as required for the requested immigrant visa category. *See* Final Rule for Immigrant Visa Petitions, 56 Fed. Reg. at 60900; 8 C.F.R. § 204.5(k)(3)(i)(B). We therefore found that, contrary to 8 C.F.R. § 204.5(k)(4)(i), the labor certification does not demonstrate the job's need for an advanced degree professional.

A. The Petitioner's Intent

On motion, the Petitioner argues that we neglected to consider its intent in drafting the language in section H.14 of the labor certification. The company submits affidavits from its officials stating that they intended the wording to indicate the company's acceptance of a combination of a two-year foreign baccalaureate and a two-year foreign master's degree, like the Beneficiary has. The record establishes that his Pakistani master of commerce degree equates to a U.S. bachelor's degree in business administration. Citing a U.S. district court decision, the Petitioner contends that, because a petitioner states the job requirements on a labor certification, USCIS must interpret the requirements "in light of the petitioner's intent." *See SnapNames.com, Inc. v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005 *11 (D. Or. Nov. 30, 2006).

A federal district court decision binds only the parties in that case. *Matter of K-S-*, 20 I&N Dec. 715, 718 (BIA 1993). But even if we had to follow *SnapNames* in this matter, the Petitioner misunderstands the court's holding. The court ruled that "the visa petitioner defines the labor certification requirements and therefore, *where ambiguous*, those requirements must be interpreted in light of the petitioner's intent." *SnapNames.com*, 2006 WL 3491005 at *11 (emphasis added). The court recognized that USCIS:

> has an independent role in determining whether the alien meets the labor certification requirements, and where the plain language of those requirements does not support the petitioner's asserted intent, the agency does not err in applying the requirements as written. In fact, the agency is obligated to 'examine the certified job offer exactly as it is completed by the prospective employer.'

Id., at *7 (quoting *Rosedale & Linden Park Co. v. Smith*, 595 F.Supp. 829, 833 (D.D.C. 1984)).

Here, the plain language in section H.14 of the labor certification contains no ambiguity. The language states the Petitioner's acceptance of "a Bachelor's equivalent based on a combination of education as determined by a professional evaluation service." The language limits the type of acceptable educational combination to one "determined by a professional evaluation service." Thus, section H.14 indicates that, if a professional evaluation service determines that the combination equates to a U.S. bachelor's degree, a mix of lesser degrees could qualify a worker for the offered position. The requested visa category, however, requires a single-degree, baccalaureate equivalency. *See* Final Rule for Immigrant Visa Petitions, 56 Fed. Reg. at 60900; 8 C.F.R. § 204.5(k)(3)(i)(B). Thus, the labor certification indicates that the job does not necessarily require an advanced degree professional. Also, because the H.14 language lacks ambiguity, we need not consider the Petitioner's intent in drafting the wording. *See SnapNames*, 2006 WL 3491005, at *11.

Further, the *SnapNames* court required USCIS to consider a petitioner's intent when interpreting job requirements in a petition for a skilled worker. *See* section 203(b)(3)(A)(i) of the Act; *Id.*, at *6. But, in petitions for advanced degree professionals and professionals under sections 203(b)(2)(A) and 203(b)(3)(A)(ii) of the Act, the court deferred to USCIS' authority to read job requirements in light of the statutory and regulatory criteria of those categories. *Id.*, at **10-11. As previously indicated, the Petitioner seeks the Beneficiary's classification as an advanced degree professional. Thus, for this additional reason, *SnapNames* does not support consideration of the Petitioner's intent in drafting the H.14 language.

B. *Rosedale* and *Madany*

The Petitioner argues that our citations to *Rosedale* and *Madany* undermine the validity of our reliance on the "plain language" of a labor certification. The company claims that the courts in those cases rejected the immigration service's interpretation of job requirements on labor certifications and instead considered evidence of record.

Unlike the Petitioner, however, we do not read *Rosedale* or *Madany* as undermining the validity of our plain-language approach to interpreting job requirements on labor certifications. Rather, both cases support the approach. The *Rosedale* court stated that "[t]he court - like the [former] INS [Immigration and Naturalization Service] - must examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale*, 595 F.Supp. at 833. Similarly, the *Madany* court stated that "it is the language of the labor certification job requirements that will set the bounds of the . . . burden of proof." *Madany*, 696 F.2d at 1015.

Both courts ultimately considered evidence when reviewing INS' decisions on the immigrant visa petitions at issue. But the courts did not focus on evidence when interpreting job requirements on the labor certifications. In *Rosedale*, the court rejected the agency's determination that the petitioner did not demonstrate the noncitizen's possession of the requisite two years of college with a "major" in business. 595 Supp. at 833. Examining the language of the labor certification, the court criticized INS's "narrow reading of the term 'business' to include only those courses commonly studied by an American M.B.A. candidate or student in a four-year business degree program." *Id.* at 833 n.6. Again quoting the language of the labor certification, the court also found that INS "apparently failed to consider whether [the noncitizen] had a 'major field of study' in the alternative field of 'languages.'" *Id.*

The *Madany* court similarly examined the language of the labor certification to interpret the requirements of the offered position. The labor certification required the prospective employee in the offered position of nurse to "be able to obtain [a] Virginia nursing license or have [a] Virginia nursing license." 696 F.2d at 1013. The petitioner submitted evidence of the noncitizen's eligibility and registration to take a Virginia nursing license examination. *Id.* at 1010. The court, however, rejected the petitioner's assertion that the certification's requirement to "be able to obtain" a nursing license meant eligibility to sit for a license exam. *Id.* at 1013. Rather, the court endorsed a "common sense" interpretation that the noncitizen must have "an actual ability to obtain the license" as the certification's plain language indicated. *Id.* at 1013-14. *Rosedale* and *Madany* therefore do not undermine our plain-language approach.

C. The Structure of the Labor Certification Form

The Petitioner also argues that our interpretation of the offered position's alternate educational requirement conflicts with the structure of the labor certification application form. If the Petitioner wished to accept a combination of lesser degrees as a baccalaureate equivalency, the company states that it would not have selected "Bachelor's" in section H.8-A of the labor certification as the "alternate level of education required." Rather, the company states it would have selected "Other" in section H.8-A and then explained in section H.8-B its acceptance of a combination of lesser credentials. Quoting a Board of Alien Labor Certification Appeals (BALCA) case, the Petitioner states: "Section H.14 does not mention anything about alternative education, training or experience." *Matter of Federal Ins. Co.*, 2008-PER-00037, *7 (BALCA Feb. 20, 2009).

The Petitioner argues that sections H.14 of labor certifications should not contain descriptions of alternate educational requirements. But the company's language in that section clearly applies to the business's alternate educational requirement. The language states the Petitioner's acceptance of "a Bachelor's equivalent." The company's primary educational requirement is a master's degree. Thus, the language in section H.14 clearly applies to the Petitioner's alternate educational requirement of a bachelor's degree.

The Petitioner contends that its H.14 language further describes its acceptance of a foreign degree as it indicated in section H.9. But section H.9 asks only whether "a foreign educational equivalent is acceptable." Section H.9 does not further refer to the acceptability of combinations of educational credentials. Also, by indicating "Yes" in section H.9 and listing an alternate educational requirement of a "Bachelor's" degree in section H.8-A, the Petitioner effectively stated its acceptance of a foreign degree that equates to a U.S. bachelor's degree. Thus, if the company intended its language in section H.14 to mean a combination of a foreign bachelor's and master's degrees like the Beneficiary has, the language is redundant, as his single master's degree equates to a U.S. bachelor's degree consistent with the Petitioner's indication in section H.9. Because of these inconsistencies in the Petitioner's argument, we do not find our interpretation of the H.14 language to conflict with the structure of the labor certification application form.

D. Inconsistent Rationales

We also previously found that the Petitioner provided inconsistent rationales for its language in section H.14 of the labor certification. In response to the Director's NOID, the Petitioner asserted that the

language complies with the "*Kellogg* language" requirement. This requirement stems from a BALCA case called *Matter of Francis Kellogg*, 1994-INA-465 (BALCA Feb. 2, 1998) (*en banc*), the holding of which DOL attempted to codify at 20 C.F.R. § 656.17(h)(4)(ii). The regulation requires a labor certification employer to state the acceptability of "any suitable combination of education, training, or experience" on an application for a noncitizen whom the employer already employs and who seeks to qualify for a job based on alternate requirements. 20 C.F.R. § 656.17(h)(4)(ii).

The Petitioner argues that, in a prior filing, the company explained that "[t]he *Kellogg* language is inapplicable now." The Petitioner asserts that, after BALCA's *Federal Insurance* decision, DOL "no longer requires" the language on a labor certification application.

Contrary to the Petitioner's argument, however, *Federal Insurance* did not eliminate the *Kellogg* language requirement. There, BALCA held that denial of a labor certification application for omitting *Kellogg* language offends due process where the application form did not include a designated space for the language and DOL had not instructed the public on how to comply with the *Kellogg* requirement. *Matter of Federal Ins. Co.*, 2008-PER-00037, *supra*, at **7-8. While the decision suggests that DOL may not continue to deny labor certification applications for omitting *Kellogg* language, the regulation still requires labor certification employers to state *Kellogg* language on their applications when applicable. 20 C.F.R. § 656.17(h)(4)(ii). The regulation applies to the Petitioner's labor certification because the company employed the Beneficiary at the time of the application's filing, and he seeks to qualify for the job based on the alternate requirements of a bachelor's degree and five years of experience. *See id.* Thus, contrary to the Petitioner's argument, *Kellogg* language remains applicable to the company's labor certification, and the *Federal Insurance* decision does not render the Petitioner's first rationale moot. The Petitioner has not sufficiently explained its differing rationales for the language in section H.14 of the labor certification. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies of record with independent, objective evidence). The inconsistent explanations cast doubt on the accuracy and validity of the company's responses. *Id.*

For the foregoing reasons, the accompanying labor certification does not demonstrate the job's need for an advanced degree professional. We will therefore dismiss the Petitioner's combined motions.

IV. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's qualifying experience for the offered position or the requested immigrant visa category. Also, the accompanying labor certification does not establish the job's need for an advanced degree professional.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.