U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28355375

Date: JAN. 17, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, an automobile parts and accessories company, seeks to employ the Beneficiary as a business strategy and operations advisor. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding the record did not establish the Beneficiary met the experience requirements stated on the labor certification. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

Employment-based immigration as an advanced degree professional generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(k)(3)(i)(B).

Finally, if USCIS approves a petition, a beneficiary may apply for an immigrant visa abroad or, if eligible, "adjustment of status" in the United States. *See* section 245(a)(1) of the Act, 8 U.S.C. § 1255(a)(1).

The Director determined the Beneficiary did not possess the required experience for the job offered. Specifically, the Petitioner indicated the following information on the labor certification: job title - "Business Strategy & Operations Advisor" (H4), 24 months of experience required for the job (H6), no experience accepted in an alternate occupation (H10). Although the labor certification indicates the Beneficiary had experience in an alternate occupation as a "Viral Marketer" (K.b.1.-9.), which the labor certification does not permit the Beneficiary to use as experience for the job offer, the Petitioner did not show the Beneficiary possessed the required experience as a "Business Strategy & Operations Advisor."

In response to the Director's request for evidence (RFE), the Petitioner argued that "the USCIS officer narrowly interpreted the term 'job' to mean only job title that are exactly the same." Further, the Petitioner asserted that "USCIS does have practice to make it clear that multiple factors must be considered when deciding if two jobs are ins the same or similar occupational classifications job porting purposes" and referenced 7 *USCIS Policy Manual* E.5(B)(6), https://www.uscis.gov/policymanual. However, the Director found the policy guidance related to "scenarios when a job offer itself has changed but is still within the same occupational classification" and the record did not reflect the job offer had changed from a business strategy and operations advisor to another position. Further, the Director decided that any job offer change did not negate the labor certification requirements of two years of experience in the job offer with no experience counted in an alternate occupation. Moreover, the Director compared two job experience letters from K-O- and S-W- and determined the Beneficiary possessed only some of the required experience listed on the labor certification (H11) as a viral marketer. Therefore, the Director denied the petition concluding the Beneficiary's experience as a viral marketer was not the same as a business strategy and operations advisor, thereby not establishing the Beneficiary possessed the required two years of experience listed on the labor certification.

Although the Petitioner makes the same RFE arguments on appeal, we adopt and affirm the Director's decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

The Petitioner's reference to 7 *USCIS Policy Manual*, *supra*, at E.5 does not apply to the adjudication of employed-based petitions. Rather, the policy "allows certain employment-based adjustment of status applicants experiencing delays in the employment-based adjustment of status process some flexibility to change jobs or employers while their Application to Register Permanent Residence of Adjust Status (Form I-485) is pending."

Furthermore, as discussed by the Director, because the labor certification requires two years of relevant experience for the business strategy and operations advisor position and does not permit experience in an alternate occupation, the Petitioner did not demonstrate the Beneficiary possessed the required experience. When assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the offered position's minimum requirements. USCIS may neither ignore a certification term nor impose unstated requirements. *E.g., Madany v.*

Smith, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the burden of setting the *content* of the labor certification") (emphasis in original).

Finally, while the Petitioner argues the job experience letters satisfy the labor certification requirements, we do not concur. As one example, the labor certification lists "[c]onduct time studies" as a job responsibility. However, neither letter mentions the Beneficiary's experience in conducting time studies as part of her duties as a viral marketer. Experience "in the job offered" means experience performing an offered position's key duties as stated on a labor certification. *E.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *3 (BALCA Oct. 24, 2011) (citations omitted).

Accordingly, we agree with the Director that the Petitioner did not establish the Beneficiary meets the required experience contained in the labor certification.

ORDER: The appeal is dismissed.