U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23072359

Date: DEC. 27, 2022

Appeal of Texas Service Center Decision

Immigrant Petition for Advanced Degree Professional

The Petitioner, a legal services provider, seeks to employ the Beneficiary as a principal software engineer under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers, concluding that the Petitioner did not establish that the Beneficiary met the Petitioner's position prerequisites. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (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.

I. LAW

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*. A labor certification on an ETA Form 9089, Application for Permanent Employment Certification (labor certification) also indicates that the employment of a foreign national 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 foreign national 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.

The regulations at 8 C.F.R. § 204.5(k)(3)(i) state that a petition for an advanced degree professional must be accompanied by either:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, a beneficiary must meet all of the education, training, experience, and other requirements specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). Therefore, to establish eligibility for advanced degree professional classification, a petitioner must demonstrate that the beneficiary possesses an advanced degree as defined in 8 C.F.R. § 204.5(k)(2), and also that the beneficiary meets the requirements for the offered position as stated on the labor certification.

II. ANALYSIS

A. The Roles of the DOL and USCIS in the Immigrant Visa Process

We begin addressing an overarching claim the Petitioner presents on appeal: USCIS is not the proper entity to address a beneficiary's qualifications or what constitutes a foreign equivalent degree, and those issues are adjudicated by DOL. Section 212(a)(5)(A)(i) of the Act provides that:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The authority to make decisions on preference classification petitions, however, rests with USCIS. As stated by a federal circuit court:

> There is no doubt that the authority to make preference classification decisions rests with INS.[1] The language of section 204 [Procedure for Granting Immigrant Status] cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[2] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Madany v. Smith, 696 F.2d 1008, 1012–13 (D.C. Cir. 1983). *See also Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987, 990–91 (7th Cir. 2007) (quoting *K.R.K. Irvine, Inc. v. Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983)); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305 (9th Cir. 1984).

Thus, it is DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of a beneficiary will adversely affect similarly employed U.S. workers. We also note there is no evidence that DOL reviewed any supporting documents to support the Beneficiary's claimed education. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

We have established USCIS is the proper authority to review the issues in this appeal. On the labor certification the Petitioner specified in part J.11 that the Beneficiary possessed a Master's degree as his highest level of achieved education.

B. Petitioner's Position Requirements

The accompanying labor certification describes the minimum requirements for the job offered as follows:

H.4	Education: minimum level	Master's
H.4-B	Major field of study	Computer science
H.5	Training required?	No
H.6	Experience in the job offered required?	Yes
H.6-A	Number of months	24
H.7	Alternate field of study acceptable?	No
H.8	Alternate combination of education and experience acceptable?	No

[1] Immigration and Naturalization Service, the predecessor organization to USCIS.
[2] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

H.9	Foreign educational equivalent acceptable?	Yes
H.10	Experience in an alternate occupation acceptable?	Yes
H.10-A	Number of months experience required	24
H.10-B	Job title of alternate occupation	Sr. PHP Developer or related

Here, the labor certification states the minimum requirements of the offered position as: a U.S. master's degree or a foreign equivalent degree in computer science and 24 months of experience. The labor certification specifies the Petitioner will not accept an alternate combination of education and experience, but they will accept 24 months of experience in a specific position.

C. Education, Evaluations, and Equivalencies

The Petitioner presented primary evidence of the Beneficiary's degrees in the form of a 2006 Bachelor of Science from [redacted] University of [redacted] and a 2008 Master of Computer Science from the same institution. Although the appeal brief contains an education evaluation for the Beneficiary's 2019 master's degree in data science from the University of Management and Technology, also in Pakistan, they did not offer primary evidence of this degree in the form of his diploma or transcripts. The regulation and the petition's instructions each informed the Petitioner that his initial evidence requirements included his "official academic record" showing he has a U.S. advanced degree, U.S. baccalaureate degree, or an equivalent foreign degree. 8 C.F.R. § 204.5(k)(3)(i).

An education evaluation is not an official academic record, which is the primary evidence required by the regulation. Such evidence that is not corroborated by the primary evidence of an official academic record falls short of meeting the Petitioner's burden of proof that the Beneficiary has the claimed degree conferred in 2019. *See* 8 C.F.R. § 103.2(b)(2) (indicating only where the filing party demonstrates that primary evidence does not exist or cannot be obtained may they rely on secondary evidence, and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits or letters). As a result, we will not consider the claimed degree conferred in 2019 other than to note the contents of the degree's associated education evaluation.

The Petitioner also submitted three sets, or versions, of education evaluations relating to the Beneficiary's 2006 and 2008 degree. The first was submitted when the Petitioner filed the petition. Silvergate Evaluations performed that evaluation and it acknowledged both the 2006 and 2008 degrees, equating those collectively to a U.S. bachelor's degree in computer science. Then, the Director issued a notice of intent to deny (NOID) in part because the Petitioner did not establish the Beneficiary's foreign degrees met the position requirements of a master's degree in computer science as stated on the labor certification.

Responding to the NOID, the Petitioner provided two evaluations from Validential Corp. We note the Petitioner's appeal brief repeatedly refers to evaluations from Validation Corp., but the record does not contain evaluations from that organization, and we will presume they meant to identify the similarly named company we listed above. The Validential Corp. evaluations the Petitioner submitted in its NOID response separately equated the Beneficiary's 2006 degree to a U.S. Bachelor of Science

in General Studies. The second Validential Corp. evaluation equated the Beneficiary's 2008 degree to a U.S. Master of Science in Computer Science. In the petition denial, the Director noted the evaluations do not include any probative information about the length of the academic programs the Beneficiary completed or any analysis beyond the simple conclusive statements of the evaluator's findings. The Director found that the record does not include the Beneficiary's transcripts reflecting the courses he took or the dates of attendance for his foreign bachelor's and master's degree programs.

The Director noted the inconsistent information contained within the first and second set of evaluations as well as observing the evaluations did not align with the relevant information in the Electronic Database for Global Education (EDGE) that was created by the American Association of Collegiate Registrars and Admissions Officers. Because the evaluations were not consistent within each set, as well as with EDGE, the Director ascribed the evaluations with diminished evidentiary value and concluded the record did not establish the Beneficiary holds a U.S. Master's degree in an acceptable field of study or a foreign equivalent degree.

Now on appeal, the Petitioner submits a third set of education evaluations consisting of three separate evaluations, again from the same Validential Corp. evaluator who performed the evaluations submitted in the NOID response. Within this third set, the evaluator changed their conclusions. The evaluator now equates the Beneficiary's 2006 degree to a U.S. Associate of Science (previously they equated it to a U.S. Bachelor of Science in General Studies). Regarding his 2008 degree, the evaluator now amended their findings to equate this degree to a U.S. Bachelor of Science in Computer Science (previously equated to a U.S. *Master* of Science in Computer Science). And as previously mentioned, the Petitioner submitted an evaluation for a degree they claim the Beneficiary earned in 2019, but they failed to provide primary evidence of the degree. The evaluator equated this alleged Master of Science in Data Science from the University of Management and Technology in Pakistan to a U.S. Master of Science in Data Science.

In addition to the third set of evaluations, the Petitioner claims the Director was incorrect to conclude the evaluations were inconsistent. Instead, the Petitioner states the Silvergate evaluation was conducted for the purpose of securing an H-1B petition for the Beneficiary in which they had to establish he possessed at least the equivalent to a U.S. bachelor's degree in a specific field. The Petitioner states: "With this requirement and regulation in mind, the evaluator provided the bare minimum degree evaluation required for H-1B purposes." They present a similar argument relating to the evidence they submitted before the Director for this petition and the advanced degree regulatory requirements stating the evaluator reviewed the Beneficiary's education credentials including the transcripts and degrees, and determined that he possessed a single-source foreign degree equivalent to a U.S. master's degree in computer science.

Regarding the third set of evaluations submitted on appeal, the Petitioner claims these "are not new evidence. Rather, these evaluations are submitted as further documentary support of and clarifying evidence regarding the evaluations provided" with the NOID response." The Petitioner's conclusory claim that it essentially had the evaluations tailored to the immigration benefit they were seeking at the time is not "objective evidence." They did not present any explanatory evidence from the evaluating companies nor from a third entity in the education evaluation industry that might actually serve as objective evidence. The Petitioner's unsupported claims or the submission of letters from experts supporting the petition is not presumptive evidence of eligibility. We may, in our discretion, use

an evaluation of a person's foreign education as an advisory opinion. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008).[3] Therefore, we affirm the Director's determination that the education evaluation material in the record carries less weight than would other forms of evidence that demonstrate factual events (e.g., the Beneficiary's official academic record such as his official transcripts).

And as the Director noted, USCIS relies on the information contained in EDGE as it is a peer-reviewed source of information about foreign degree equivalencies, and the Beneficiary attained a Master of Computer Science from Pakistan. We observe that federal appeals courts have recognized it is within USCIS' discretion to decide which materials we will rely upon, and we are "entitled to give [] letters and evaluations less weight in light of the fact that they differ[] from the information provided in EDGE, which is a respected source of information." *Viraj, LLC v. U.S. Atty. Gen.*, 578 F. App'x 907, 910 (11th Cir. 2014); *see also Confluence Intern., Inc. v. Holder,* Civil No. 08-2665 (DSD-JJG), 2009 WL 825793 (D. Minn. Mar. 27, 2009); *Tisco Group, Inc. v. Napolitano*, No. 09-cv-10072, 2010 WL 3464314 (E.D. Mich. Aug. 30, 2010); *Sunshine Rehab Services, Inc*. No. 09-13605, 2010 WL 3325442 (E.D. Mich. Aug. 20, 2010). "[T]he choice of what reference materials to consult is quintessentially within an agency's discretion . . . ." *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 146 (1st Cir. 2007).

Even setting the inconsistent nature of the education evaluations aside, EGDE reflects a Master of Science from Pakistan "represents attainment of a level of education comparable to a bachelor's degree in the United States." But that falls short of the Petitioner's position requirement listed on the labor certification of a master's degree or a foreign educational equivalent. The Petitioner therefore has not demonstrated this Beneficiary has satisfied its position's educational requirements as of the date it filed the petition. And as noted, we do not consider the degree the Petitioner's appeal brief alleges the Beneficiary earned in 2019. Not only did they fail to offer evidence that he possesses that degree, but had they submitted evidence of the degree on appeal, it would amend their claims of the Beneficiary's eligibility to the extent that it could constitute a material change to the petition.

Within the appeal, the Petitioner contends that USCIS cannot question their definition of their own job requirements relating to "what is meant by [the term Master Degree or foreign equivalent]." The Petitioner offers no legal authority permitting it to define what constitutes a foreign equivalent of a U.S. master's degree. Adopting the Petitioner's proposal would not only render meaningless the statutory and regulatory requirements at section 203(b)(2) of the Act and 8 C.F.R. § 204.5(k)(2), but it would also require that we ignore those provisions. Section 203(b)(2) requires an advanced degree which is a professional degree more advanced than or above that of a professional baccalaureate degree as described in section 203(b)(3)(A)(ii) of the Act. The regulation at 8 C.F.R. § 204.5(k)(2) specifically defines an "advanced degree" to mean "any United States academic or professional degree or a foreign equivalent degree above that of [a] baccalaureate."

An agency is not free to ignore a statute governing their conduct. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374, 385 (1989) (finding that an agency is not free to ignore the possible significance of new information when the statute requires them to take a "hard look" at it to determine whether

[3] We note that one element of the *V-K-* decision was overruled within *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015); however, this does not affect the portion of *V-K-* we cite to here.

further action is necessary). Further, the regulations have the force and effect of law and are binding on all USCIS employees, and we cannot simply ignore those requirements. *Matter of L-*, 20 I&N Dec. 553, 556 (BIA 1992) (citing to *Bridges v. Wixon*, 326 U.S. 135, 153 (1945).

And we do not propose to supplement our judgement for that of the Petitioner's on its own position requirements. While the Petitioner might view a foreign master of computer science degree as a sufficient qualification for U.S. worker candidates to perform work for their company in the offered position, such a qualification does not necessarily satisfy the statutory or regulatory requirements of this immigrant classification. Inherent with employing foreign nationals are additional burdens a U.S. employer must satisfy when compared to their self-imposed requirements of U.S. workers. Part of that burden in this context is to demonstrate the Beneficiary possesses the qualifications it listed on the labor certification.

A scenario such as the one in the present case in which a petitioner finds as acceptable a foreign degree—that it has not shown to be equivalent to a U.S. master's degree—is normally one that can be prohibitive for a petitioner attempting to demonstrate that it can meet the statutory and regulatory requirements for this immigrant classification. Ultimately, the Petitioner here has not preponderantly demonstrated that the Beneficiary is qualified to occupy its position based on its own requirements as presented on the labor certification.

D. Skills Required on the Labor Certification

As it relates to the skills the Petitioner listed on the labor certification within H.14 for the specific skills or other requirements, they specified: "Expertise in: PHP, modern front end framework, or equivalent; building large scale, real-time, or distributed applications; restful API design and testing." The Director reviewed the experience letter from [redacted] who employed the Beneficiary from November 2012 through June 2017. Our review of the letter reveals he occupied the position of Principal Software Engineer, he used the PHP programming language, and it lists the technologies and frameworks he used, tools, libraries, storage methodologies, and the cloud applications. The Director concluded the experience letter does not state that the Beneficiary gained expertise or experience in building large scale, real-time, or distributed applications during his employment with that organization.

The Petitioner has not established that the Beneficiary's use of the PHP programming language, or the other elements listed in the [redacted] letter, means that he built large scale, real-time, or distributed applications with that organization. The PHP language is a scripting language that can be used to build the type of applications the Petitioner listed on the labor certification under H.14, but it can also be as basic as coding because it is used by web developers to embed code into HTML. *PHP*, PHP (Dec. 27, 2022), https://www.php.net/; *PHP (Hypertext Preprocessor)*, TechTarget (Dec. 27, 2022), https://www.techtarget.com/whatis/definition/PHP-Hypertext-Preprocessor. We therefore find no error in the Director's analysis here. We further note the Beneficiary occupied the position of Principal Software Engineer with [redacted] and the Petitioner has not demonstrated he has two years of experience as a "Sr. PHP Developer or related," as specified on the labor certification.

Further, lacking from the record was any further detail or guidance regarding what the petitioning organization would consider to be a "related" position. We cannot intuit the breadth of the positions

the Petitioner would, or would not, consider to be sufficiently related. Furthermore, what one employer might consider to be sufficiently related, may differ from what other employers would consider to be adequate. This illustrates the manner in which the Petitioner's information on the labor certification was not sufficiently specific.

Moreover, the Petitioner does not address the Beneficiary's experience, or the lack of sufficient evidence relating to such experience, on appeal. This is a salient issue as the Petitioner not only required a master's degree on the labor certification, but they also required 24 months of a specific type of experience. The Petitioner's failure to address this issue on appeal effectively means they have waived the issue at this stage. *Matter of Zhang*, 27 I&N Dec. 569, 569 n.2 (BIA 2019) (finding that an issue not raised on appeal is deemed as abandoned). Because the Petitioner required 24 months of experience in addition to the specified degree, their abandonment of this issue on appeal is sufficient to dispose of the appeal on this shortcoming alone. *See Matter of Koat*, 28 I&N Dec. 450, 451 (BIA 2022) (declining to reach alternative issues on appeal where a filing party is otherwise ineligible).

To summarize, the Petitioner has not established the Beneficiary met the minimum education for the offered position as set forth on the labor certification, which is also required for the requested classification of an advanced degree professional. Additionally, the Petitioner did not establish the Beneficiary possessed all of the required skills for the offered position as presented on the labor certification.

III. CONCLUSION

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 a petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.