U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19818268

Date: AUG. 1, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as an assisted living facility caregiver. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Beneficiary met the minimum requirements for the proffered position as of the priority date. On appeal, the Petitioner reasserts that it made a clerical error on the labor certification.

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 unskilled worker 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 "other worker" is defined in the regulation at 8 C.F.R. § 204.5(l)(2) as follows:

> *Other worker* means a qualified [noncitizen] who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(D) states that a petition for an unskilled worker must be accompanied by evidence that the noncitizen meets any educational, training and experience, and other requirements of the labor certification.

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).

II. ANALYSIS

As noted above, the Director found that the record did not establish that the Beneficiary met the minimum requirements for the proffered position. The DOL ETA Form 9089, Application for Permanent Employment Certification, submitted with the Form I-140, Immigrant Petition for Alien Workers, indicates that the minimum level of education required for the proffered position is a high school diploma. In item H.9 of the ETA Form 9089, the Petitioner specified that a foreign educational equivalent to a U.S. high school diploma is unacceptable, by checking the "No" response. The priority date is November 12, 2019, the date that DOL received the ETA Form 9089. The Petitioner submitted a document that appeared to be a foreign language diploma from [redacted] School in the Philippines; however, the Petitioner did not submit an English translation of the document.

In a request for evidence (RFE), the Director requested the Petitioner to provide an English translation of the document in question. The Director also observed that the ETA Form 9089 indicates that a foreign educational equivalent is unacceptable. The Director further observed that the name on the document in question does not match the name of the Beneficiary. Therefore, the Director requested the Petitioner to submit evidence to establish that the Beneficiary meets the education requirements indicated on the certified ETA Form 9089 as of the priority date.

In response to the RFE, the Petitioner submitted an English translation of the diploma, establishing that it is a diploma, certifying the completion of high school education at the [redacted] School in the Philippines. The Petitioner also submitted a photocopy of a marriage certificate, purporting to establish that the Beneficiary changed her name upon marriage; however, the quality of the photocopy is poor and substantially all of the text on the document, particularly the names of the individuals certified as married, is illegible. The Petitioner further asserted:

> There was an error in answering the question on the ETA Form 9089 page 3 letter H number 9.
>
> The office is amending the ETA Case Form 9089 page 3 of 10 Letter H. Job Opportunity Information No. 9 Is a foreign education equivalent acceptable? Yes No

The answer is Yes.

The Petitioner also submitted a photocopy of page 3 of the certified ETA Form 9089 submitted with the Form I-140, with the "No" response to item H.9 manually covered with liquid correction fluid and the "Yes" response marked with a black ink pen.

In the decision, the Director noted that USCIS may not ignore a term of a labor certification, citing *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986); *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The Director also observed that USCIS must "examine the certified job offer exactly as it is completed by the prospective employer," citing *Rosedale Linen Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). The Director acknowledged that the Petitioner may have intended to respond "Yes" to item H.9 on the ETA Form 9089; however, the Director cited *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r 1998), which provides that a petitioner may not make material changes to a petition that has already been filed in an effort to make a deficient petition conform to USCIS requirements. Because the ETA Form 9089 certified by DOL indicated that the minimum education requirement for the position is a U.S. high school diploma and that a foreign equivalent is unacceptable, and because the record does not contain a U.S. high school diploma for the Beneficiary as of the priority date, the Director found that the record did not establish that the Beneficiary met the minimum requirements for the position as of the priority date and, therefore, the Beneficiary does not qualify for the position.

On appeal, the Petitioner reasserts that the indication on the ETA Form 9089 certified by DOL that the position requires a U.S. diploma and that a foreign equivalent is unacceptable "was an inadvertent error." The Petitioner further asserts that DOL "had the initial and originating authority to deny [the Beneficiary."

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. at 159. Petitioners must establish eligibility for a requested benefit at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 176.

Further, the regulation at 20 C.F.R. § 656.11(b) prohibits any modification to labor certifications filed after July 16, 2007. The labor certification in this case was filed after July 16, 2007, and thus it is barred from modification or amendment. As the DOL made clear in the preamble to the *ETA, Proposed Rule, Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, Permanent Labor Certification Program*, 71 Fed. Reg. 7655 (Feb. 13, 2006), "[u]nder proposed 656.11(b), DOL clarifies that requests for modification to an application submitted under the current regulation will not be accepted.... Nothing in the streamlined regulation contemplates allowing or permits employers to make changes to applications after filing." *Id.* at 7659. The preamble goes on to highlight that:

> The online application system is designed to allow the user to proofread and revise before submitting the application, and the [DOL] expects and assumes that users will do so. Moreover, in signing the application, the employer declares under penalty of perjury that he or she has read and reviewed the application and the submitted information is true and accurate to the best of his or her knowledge. In the event of an inadvertent error or any other need to refile, an employer can withdraw an application, make the corrections and file again immediately. . . . In addition, the entire application is a set of attestations and freely allowing changes undermines the integrity of the labor certification process because changing one answer on an application could impact analysis of the application as a whole.

Id. Here, the attempt to change the answer from "no" to "yes" for question H.9 materially changes the requirements of the offered position and impacts the analysis of the labor certification as a whole. *See Matter of Wing's Tea House*, 16 I&N Dec. at 159; *see also* 8 C.F.R. § 103.2(b)(1); *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249; *Matter of Izummi*, 22 I&N Dec. at 176.

Furthermore, the Petitioner's assertion on appeal that DOL "had the initial and originating authority to deny [the Beneficiary]" is misplaced. DOL approval of an ETA Form 9089 signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that the employment of a noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval of an ETA Form 9089 does not signify that a particular beneficiary has met the minimum requirements for the position described therein. USCIS, not DOL, determines whether a beneficiary is qualified for a proffered position under a labor certification's stated requirements. *See, e.g., Matter of Wing's Tea House*, 16 I&N Dec. at 160 (citing section 203(a)(6) of the Act, 8 U.S.C. § 1153(a)(6)). Therefore, the fact that DOL certified the ETA Form 9089 submitted in support of the Form I-140 does not indicate that DOL deemed the Beneficiary qualified for the proffered position, notwithstanding the requirements stated on the ETA Form 9089, nor would DOL have had the authority to make such a determination.

In summation, the record does not establish that the Beneficiary had a U.S. high school diploma, the stated minimum education requirement for the proffered position, as of the priority date; therefore, the record does not establish that the Beneficiary was qualified for the position as of the priority date. *See id.* at 159.

III. CONCLUSION

The record does not establish that the Beneficiary was qualified for the proffered position as of the priority date; therefore, the record does not establish that the Beneficiary is eligible for the position.

ORDER: The appeal is dismissed.