U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20580191

Date: AUG. 4, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a business systems analyst. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). 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 at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Beneficiary met the minimum job requirements and, therefore, is not considered qualified for the position. On appeal, the Petitioner reasserts that the Beneficiary is qualified for the position.

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

> *Skilled worker* means [a noncitizen] who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states that a petition for a skilled worker must be accompanied by:

> evidence that the [noncitizen] meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 concluded that the record did not establish that the Beneficiary met the minimum job requirements and, therefore, is not considered qualified for the 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 job requirements for the proffered position include a bachelor's degree in computer science, engineering, business administration, or a related field, and 24 months of experience in the job offered or as a computer software professional; or, in the alternative, "4 yrs exp in job/off or as Comp S/W Professional in lieu of Bachelor's degree plus 2 yrs exp." The priority date in this matter is the ETA Form 9089 filing date, April 25, 2019.

The Petitioner asserted in a letter in support of the Form I-140 that the Beneficiary earned a master of science in software engineering from [redacted] University in [redacted] California, in 2012. However, the Petitioner also asserted that "[the] Beneficiary is not utilizing [his] education towards the minimum requirements of the [l]abor [c]ertification. [The] Beneficiary is qualifying under the alternate work requirement." Even if the Petitioner intended to establish eligibility under the primary requirement of a bachelor's degree and 24 months of experience in the job offered or as a computer software professional, the record does not establish that the Beneficiary had sufficient work experience, based on unresolved inconsistencies addressed below.

Prior to denying the Form I-140, the Director first sent the Petitioner a request for evidence (RFE), noting inconsistent work experience dates for the Beneficiary in the record, and requesting evidence that may resolve those inconsistences. After the Petitioner responded to the RFE, the Director then sent the Petitioner a notice of intent to deny (NOID), again noting inconsistent work experience dates for the Beneficiary in the record that the Petitioner did not clarify, and requesting evidence that may

resolve the inconsistencies in the record. The Petitioner's NOID response created further inconsistencies regarding the Beneficiary's work experience, rather than resolving them. The Director found that the inconsistencies regarding the Beneficiary's work experience reduced the credibility of the evidence, citing *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988); and therefore, the Petitioner did not establish that the Beneficiary met the minimum requirements at the time the DOL accepted the ETA Form 9089 and thus was not qualified for the position.

Specifically, in the decision the Director noted inconsistencies regarding the Beneficiary's work experience as follows:

- The ETA Form 9089 submitted by the Petitioner indicates that the Beneficiary worked for [redacted] from August 16, 2012, to February 6, 2017; however, [redacted] filed a Form I-140 on behalf of the Beneficiary on February 21, 2017, including an ETA Form 9089 signed by its president on February 17, 2017, indicating that it intended to continue employing the Beneficiary beyond February 2017. Moreover, a letter also dated February 16, 2017, signed by the president of [redacted] submitted with that Form I-140 addresses current duties the Beneficiary continued to perform as an employee. USCIS denied this Form I-140 in 2018.
- The ETA Form 9089 submitted with the Form I-140 filed by [redacted] in 2017 indicates that the Beneficiary's employment start date was October 16, 2014, not August 16, 2012; however, the record contains IRS Forms W-2, Wage and Tax Statements, for the Beneficiary, indicating that he received income from [redacted] in 2012 and 2013.
- Rather than clarifying the inconsistencies regarding the Beneficiary's dates of employment at [redacted] a letter from its CEO, submitted in response to the NOID, states that the Beneficiary's "correct employment dates, August 16, 2012[,] to February 03, 2017, are now being provided," further confusing the Beneficiary's employment end date.
- The ETA Form 9089 submitted with the Form I-140 filed by [redacted] in 2017 indicates that the Beneficiary worked for [redacted] from June 1, 2012, until September 30, 2014; however, the ETA Form 9089 submitted by the Petitioner omits the Beneficiary's employment with [redacted] instead listing his next-most recent employment as being with [redacted] from May 30, 2011, until December 19, 2011. Moreover, the stated 2012-2014 employment at [redacted] overlaps with the employment start and end dates at [redacted] listed on the ETA Form 9089 submitted by the Petitioner.
- In response to the NOID, the Petitioner submitted a letter signed by the Beneficiary, asserting that the information entered on the ETA Form 9089 filed by [redacted] "was neither provided by me nor did I authorize the filing of the I-140." However, Box L.2 of the ETA Form 9089 filed by [redacted] bears the Beneficiary's signature and the date of February 16, 2017, 10 days after the ETA Form 9089 filed by the Petitioner states the Beneficiary's employment at [redacted] ended.

On appeal, the Petitioner initially asserts that the Director "fails to concretely indicate what the information in the record is and/or where the letter dated February 16, 2017[,] was produced. No information on the record, as it pertains to the underlying filing with [the Petitioner], contained contradictory information *or* a letter from [redacted] dated February 16, 2017." However, the Petitioner later concedes on appeal that the Director specified in the decision "that the 'information in the record' is '[t]he previous letter by the President of [redacted] the Form 1-140 [*sic*], and labor certification filed in 2017.'"

Next, the Petitioner reasserts on appeal the Beneficiary's employment history as provided on the ETA Form 9089 it submitted, denying employment by [redacted] "at anytime." The Petitioner acknowledges that the letter from the CEO of [redacted] submitted in response to the NOID further confused the Beneficiary's end date of employment. However, the Petitioner asserts that, "[w]hen all supporting evidence is viewed in totality, USCIS should conclude that the end date of employment is February 6, 2017." The Petitioner further reasserts that the "Beneficiary has provided a signed affidavit under which he declares under penalty of perjury that he was not aware of the filing of [the ETA Form 9089 by [redacted] did not sign this [ETA Form 9089], and did not authorize the filing of the [ETA Form 9089 and Form I-140]." The Petitioner also concedes that the NOID "fully explains the nature of the information in the record" on which the Director relied, before entering the decision. However, the Beneficiary's signature on the ETA Form 9089 submitted by [redacted] matches the Beneficiary's signature on other documents in the record, including his signature on the ETA Form 9089 submitted by the Petitioner, and his signature on the affidavit in which he denies having signed the ETA Form 9089 submitted by [redacted]

The Petitioner's reassertions on appeal of information already in the record, without any additional, probative evidence, do not overcome the inconsistencies in the record summarized above. The Petitioner's denial that the Beneficiary was ever employed by [redacted] conflicts with the 2017 ETA Form 9089, which bears the Beneficiary's signature, reporting that he was employed by [redacted] from June 1, 2012, until September 30, 2014. The Beneficiary's statement in response to the NOID that the information entered on the ETA Form 9089 filed by [redacted] "was neither provided by me nor did I authorize the filing of the I-140" directly conflicts with his signature on that ETA Form 9089, dated 10 days after the Petitioner asserts his employment at [redacted] ended. In addition to further confusing the Beneficiary's actual end date of employment at [redacted] the letter from its CEO submitted in response to the NOID did not clarify why [redacted] filed a Form I-140 with a related ETA Form 9089 on behalf of the Beneficiary on February 21, 2017, if his employment, in fact, had ended on either February 3 or 6, 2017. Moreover, the CEO letter submitted in response to the NOID did not clarify who, other than the Beneficiary, may have provided the information and signed the 2017 ETA Form 9089, which bears the Beneficiary's specific alien admission number reflected on his Form I-94, Arrival/Departure Record, identical to the alien admission number provided on the ETA Form 9089 submitted by the Petitioner.

The numerous inconsistencies regarding the Beneficiary's employment history casts doubt on the accuracy of statements related to his experience, undermining the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Because the evidence, particularly relating to the Beneficiary's experience, bears

diminished reliability, the Petitioner has not met its burden to establish eligibility for the requested benefit. *See id.*; *see also* section 291 of the Act; 8 C.F.R. § 204.5(l)(2)-(3); *Matter of Wing's Tea House*, 16 I&N Dec. at 159.

The Petitioner also requests on appeal that we use our "discretionary authority pursuant to 8 C.F.R. § 214.1(c)(4) and approve this petition so that the Beneficiary may remain the United States and pursue his desire to become a permanent residence, and ultimate, U.S. Citizen [*sic*]."

The regulations provide that USCIS has the discretion to excuse a failure to file an extension of stay for a nonimmigrant who failed to maintain a previously accorded status or where such status expired before the application or petition was filed, upon demonstrating the following:

> (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and [USCIS] finds the delay commensurate with the circumstances;
> (ii) The [noncitizen] has not otherwise violated his or her nonimmigrant status;
> (iii) The [noncitizen] remains a *bona fide* nonimmigrant; and
> (iv) The [noncitizen] is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

8 C.F.R. § 214.1(c)(4). The regulation at 8 C.F.R. § 214.1(c)(4) relates to nonimmigrant classifications, not immigrant classifications. Because the current petition requests an immigrant classification, the regulation at 8 C.F.R. § 214.1(c)(4) is inapplicable here. Accordingly, we need not address the Petitioner's request regarding 8 C.F.R. § 214.1(c)(4) further.

III. CONCLUSION

The record does not establish that the Beneficiary meets the experience requirements of the labor certification; therefore, the Beneficiary is ineligible for the offered position. *See Matter of Wing's Tea House*, 16 I&N Dec. at 159.

ORDER: The appeal is dismissed.