U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19882274

Date: AUG. 5, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, an information technology (IT) consulting company, seeks to employ the Beneficiary as an IT consultant. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. Immigration and Nationality Act (the Act) section 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, finding that the Beneficiary did not qualify for the job offered because he did not meet the minimum requirements of the labor certification. On appeal, the Petitioner asserts that the Beneficiary meets the minimum requirements of the labor certification and the Director's decision to the contrary was erroneous.

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. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a noncitizen in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS) with the certified labor certification. *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the noncitizen applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is April 27, 2020. *See* 8 C.F.R. § 204.5(d).

II. ANALYSIS

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

The Petitioner requests classification of the Beneficiary as a skilled worker. In order to qualify as a skilled worker, the Beneficiary must possess at least two years of training or experience and meet the "educational, training or experience, and any other requirements of the individual labor certification." 8 C.F.R. § 204.5(l)(3)(ii)(B). Here, the accompanying labor certification states the primary minimum requirements of the offered position of IT consultant are a U.S. master's degree or a foreign equivalent degree in computer science, engineering, or a closely related field, and 24 months of experience in the alternate occupation of computer software developing or consulting.[2] The alternate minimum requirements of the offered position are a U.S. bachelor's degree or a foreign equivalent degree and five years of experience in computer science, engineering, or a closely related field.

Part H.14 of the labor certification ("Specific skills or other requirements") states: "Will accept U.S. equivalent of the degrees. Will work at unanticipated client locations throughout the U.S." Part H.14 of the labor certification further states: "Will accept any suitable combination of education, training, and/or experience." Like the Director, we will refer to this statement as "Kellogg language." In *Matter of Kellogg*, 94-INA-465 (BALCA Feb. 2, 1998) (*en banc*), the Board of Alien Labor Certification Appeals held that a labor certification application must contain the statement where a noncitizen already works for the employer, does not meet the position's primary requirements, and only potentially qualifies for the job based on its alternative requirements.[3]

Part J of the labor certification states that the Beneficiary's highest level of education relevant to the job opportunity is a bachelor's degree in computer science from [redacted] in India, completed in 2001. The record contains the Beneficiary's diploma and transcripts, as well as an educational evaluation from [redacted] Head Evaluator for [redacted] who states that the Beneficiary's foreign degree, entitled "Engineering Bachelor, Computer Engineering," is equivalent to a U.S. high school diploma plus a U.S. associate's degree in information technologies. The Petitioner does not dispute this educational equivalency.

Part K of the labor certification states that the Beneficiary has been employed as an IT consultant with the Petitioner in [redacted] New Jersey since October 15, 2015. The labor certification also states that the Beneficiary was employed as a senior consultant by [redacted] from May 22, 2006, through October 13, 2015. The record contains letters from both the Petitioner and [redacted] confirming the Beneficiary's employment and associated job duties.

In his decision denying the petition, the Director interpreted the job offer portion of the labor certification as requiring either a master's degree and 24 months of experience in an alternate occupation, or a bachelor's degree plus five years of experience, and found that the Beneficiary did

[2] The Petitioner does not state a requirement for experience in the job offered in Part 6 of the labor certification.

[3] The regulation at 20 C.F.R. § 656.17(h)(4)(ii) identifies the Kellogg language as "any suitable combination of education, training, or experience." Here, we note that the Petitioner's statement in Part H.14 modifies this language slightly by replacing the word "or" with the phrase "and/or."

not meet these primary or alternate educational requirements because he did not have the foreign equivalent of either a U.S. master's or U.S. bachelor's degree. The Director determined that the modified version of the Kellogg language in Part H.14 of the labor certification did not alter the minimum requirements stated on the labor certification.

On appeal, the Petitioner asserts that the language at Part. H.14 indicates that it is willing to accept any suitable combination of education, training and/or experience, and because the Beneficiary has an associate's degree and more than 12 years of experience in the field, he meets the minimum requirements of the labor certification. The Petitioner further asserts that the Director's finding to the contrary "is completely contrary to the rationale of the Kellogg decision." In support of this assertion, the Petitioner refers to our non-precedent decision in which we determined that the Petitioner's modification of the standard Kellogg language altered the minimum requirements of the labor certification, and asserts that the same treatment should be afforded here. However, that decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. See 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. Additionally, that case is distinguishable from the instant case. In that case, the Petitioner added the phrase "in lieu of the above stated education and experience requirements" to the standard Kellogg language, which therefore indicated the Petitioner's acceptance of a combination of education and experience not in accord with the minimum requirements outlined in sections H.4 and H.10 of the labor certification. Here, however, the Petitioner stated in section H.14 that it "will accept any suitable combination of education, training, and/or experience," which does not meaningfully modify the standard, regulatory-required language. We do not interpret this sentence to mean that the employer would accept lesser qualifications than the primary and alternative requirements stated on the labor certification.

The Petitioner does not claim that the Beneficiary's education alone is the foreign equivalent of a U.S. master's or U.S. bachelor's degree, nor does it submit evidence to establish that the Beneficiary's degree from India is the foreign equivalent of a U.S. master's or U.S. bachelor's degree. Rather, the Petitioner asserts that the labor certification allows the Beneficiary to qualify for the offered position with a combination of his associate's degree and over 12 years of experience.

In order to determine the minimum requirements of a proffered position, we must examine "the language of the labor certification job requirements." *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the labor certification application form. *Id.* at 834.

The Director interpreted the job offer portion of the labor certification as requiring a U.S. master's degree or a foreign equivalent degree in computer science, engineering, or a closely related field (sections H.4, H.4-B, H.7, H.7-A, and H.9) and 24 months of experience in an alternate occupation (sections H.10, H.10-A, and H.10-B), or a bachelor's degree or a foreign equivalent degree and five years of experience (sections H.8, H.8-A and H.8-C). The Director found that the Beneficiary did not meet either the primary or alternate educational requirements because his degree from India was not the foreign equivalent of either a U.S. master's or U.S. bachelor's degree, and also found that the

Kellogg language was not qualified by the Petitioner in such a way so as to lower the educational and experience requirements stated on the labor certification - namely, a master's or foreign equivalent degree and 24 months of experience in an alternate occupation, or a bachelor's degree or foreign equivalent degree and five years of experience. The Director concluded that the minimum education and experience required by the labor certification was unchanged by the language in Part H.14.

On appeal, the Petitioner implies that its use of the phrase "and/or" in place of the conjunction "or" in Part H.14 goes beyond the standard Kellogg language and therefore has sufficiently lowered the minimum educational requirements set forth on the labor certification. The Petitioner's argument, however, ignores the instructions and structure of the labor certification form. The form at Part H.4 instructed the Petitioner to state the minimum level of education required for the offered position and at Part H.8-A, if applicable, an accepted, alternate level of education.

So informed, the Petitioner at Part H.8-A indicated "bachelor's degree" as the alternate educational requirement, rather than "associate's degree" or another lesser U.S. educational level. Thus, on the labor certification, the Petitioner indicated a minimum requirement of a U.S. master's degree, a U.S. bachelor's degree, or a foreign equivalent degree. The Beneficiary does not possess such a degree, and the plain language of the labor certification does not support the Petitioner's claimed intent to accept less than a U.S. master's or U.S. bachelor's degree, or foreign equivalent degree, to meet the minimum educational requirement for the proffered position. While we note that the skilled worker category does not require a degree, the labor certification in this case requires a U.S. master's degree, a U.S. bachelor's degree, or a foreign equivalent degree.

We acknowledge the Petitioner's claim that the specific vocational preparation (SVP) level of the Beneficiary's foreign equivalent of a U.S. associate's degree, combined with his 12 years of experience in the field, exceeds the SVP level of its stated primary requirements on the labor certification. However, this does not demonstrate the labor certification's acceptance of these alternate qualifications, or the Petitioner's intention to allow an associate's degree and 12 years of experience in lieu of the required education and experience. As such, we agree with the Director's determination that the modified Kellogg language in Part H.14 of the labor certification does not change the minimum educational and experience requirements stated in Parts H.4 to H.10 of the labor certification.[4]

Thus, the Beneficiary does not qualify for the job offered because he does not meet the minimum requirements of the labor certification.

III. ABILITY TO PAY

Although not addressed by the Director in his decision, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage from the priority date on April 27, 2020, and continuing until the Beneficiary obtains lawful permanent residence. The regulation at 8 C.F.R.

[4] We generally do not interpret the insertion of Kellogg language in part H.14 to mean that an employer would accept lesser qualifications than the primary and alternate requirements stated in the labor certification. If we were to read the Kellogg language as an alternate requirement, the actual minimum requirements of the offered position would be impossible to discern, the primary and alternate requirements would be made meaningless, and any labor certification using Kellogg language would be potentially ineligible for the requested classification.

§ 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." The annual proffered wage in this case is $117,021.

The Petitioner submitted its federal tax return for 2019, a copy of the Beneficiary's IRS Form W-2, Wage and Tax Statement, for 2020, and copies of the Beneficiary's paystubs for the period from December 16, 2020, to May 15, 2020. However, the record does not contain an annual report, federal tax return, or audited financial statements for the Petitioner for 2020 as required by 8 C.F.R. § 204.5(g)(2). Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

Further, USCIS records show that the Petitioner has filed 13 other Form I-140 petitions for other beneficiaries. Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition. The record does not establish the Petitioner's ability to pay all of the relevant beneficiaries in this case.

As detailed above, in any future filings, the Petitioner must submit additional evidence to establish its continuing ability to pay the proffered wage from the priority date onward.

IV. 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 the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.