U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28077420

Date: AUG. 22, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a provider of spa and massage services, seeks to permanently employ the Beneficiary as manager. The company requests her classification under the employment-based, third-preference (EB-3) immigrant visa category as a skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This category allows a U.S. business to sponsor a noncitizen for permanent residence to work in a job requiring at least two years of training or experience. *Id.*

The Acting Director of the Texas Service Center denied the petition. The Director concluded that the accompanying certification from the U.S. Department of Labor (DOL) does not demonstrate the offered position's need for a skilled worker in the requested immigrant visa category. On appeal, the Petitioner contends that, contrary to U.S. Citizenship and Immigration Services (USCIS) policy and the company's Due Process rights, the Director prevented it from correcting a clerical error in the petition before the decision's issuance.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate jurisdiction, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the Director's denial complies with USCIS policy and that the company has not established sufficient interests in the petition to trigger Due Process protections. We will therefore dismiss the appeal.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain DOL certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and permanent employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to USCIS. 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(l)(3)(ii)(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 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

A petition for a skilled worker must generally include a labor certification indicating an offered position's need for at least two years of training or experience. 8 C.F.R. § 204.5(l)(3)(ii)(B). A petitioner must mark box 1.f. in Part 2 of Form I-140, Petition for Alien Worker, requesting a beneficiary's classification as a "skilled worker." USCIS, "Form I-140," www.uscis.gov/sites/default/files/document/forms/i-140.pdf; *see* 8 C.F.R. § 103.2(a)(1) (incorporating forms instructions into Department of Homeland Security (DHS) regulations).

USCIS may change an immigrant visa category marked on a Form I-140 to correct a clerical error. USCIS, "Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Workers," www.uscis.gov/forms/all-forms/petition-filing-and-processing-procedures-for-form-i-140-immigrant-petition-for-alien-workers. The Agency's website states:

> When we accept your Form I-140 for processing, we create an electronic record and mail Form I-797, Notice of Action, (receipt notice) to you and the representative on the Form G-28. The receipt notice will indicate the visa category that you requested on Part 2 of Form I-140. Make sure this category is correct. If it is not correct (for example, if you or USCIS made a clerical error), immediately call the USCIS Contact Center at 800-375-5283 (TTY 800-767-1833) to request that we change the visa classification before making a decision on your form.
>
> Although you may request that we change the visa classification to correct a clerical error in Part 2, we will make the final determination about whether to change the visa classification based on everything in your case. If we deny your Form I-140 because you are ineligible for the requested visa category, we will also deny any related application that you filed with it (for example, Form I-485, Form I-765, or Form I-131).
>
> We cannot change the visa category if we have already made a decision on your Form I-140.

Id.

In Part 2 of the Petitioner's Form I-140, the company marked box 1.f, requesting the Beneficiary's classification as a "skilled worker." But the company's accompanying labor certification states the minimum requirements of the offered position of manager as only one year of experience in the job offered. The labor certification states that the job requires neither education nor training.

Because the labor certification requires less than two years of training or experience, the Director notified the Petitioner that the job did not appear to qualify for the requested immigrant visa category. The Director's request for additional evidence (RFE) instructed the company to establish the job's need for a skilled worker.

In its RFE response, the Petitioner stated that it inadvertently marked box 1.f. in Part 2 of the Form I-140. The company said that it meant to mark box 1.g, requesting the Beneficiary's classification as an "other worker." A position for an other worker requires less than two years of training or experience. 8 C.F.R. § 204.5(l)(2). The Petitioner submitted an amended Form I-140 with box 1.g. marked and asked the Director to accept the amended form as a correction of the claimed clerical mistake.

The Director, however, noted the Petitioner's omission of evidence explaining the occurrence of the claimed typographical error on the original Form I-140. The Director therefore declined to "correct" the purported error. The Director considered the company's new proposed immigrant visa classification to constitute an unacceptable, material change to the petition. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (AAO 1998) (holding that "a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements").

On appeal, the Petitioner contends that the petition's denial violates USCIS policy. The company notes that, according to the Agency's website, a petitioner may "request that we change the visa classification before making a decision on your form" and that USCIS "cannot change the visa category if we have already made a decision on your Form I-140." The company states that, consistent with the website information, it requested a visa category change before the decision's issuance.

The Petitioner, however, disregards the policy's portion asking a petitioner to notify USCIS of an incorrect visa category "immediately" after a receipt notice's issuance. The more immediate a petitioner's report of an incorrect visa category, the more likely the claimed inadvertence of an error on the Form I-140. Once a petitioner receives an RFE, for example, the business may believe that USCIS intends to deny the petition in the marked category and may therefore seek approval under a different visa category that the business did not initially intend to request. Thus, USCIS' policy seeks to prevent a petitioner from using one petition to request multiple immigrant visa classifications. A petitioner must file separate petitions, with separate processing fees, for each visa category requested. *See* USCIS, "Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Workers," *supra* ("If you want to classify the beneficiary under multiple visa preference categories, you must file a separate Form I-140 for each requested visa category.")

USCIS records show that the Agency issued the Petitioner a receipt notice on December 15, 2021, about three weeks after the petition's filing. The Petitioner, however, did not report the purportedly incorrect visa category to USCIS until December 14, 2022, almost one year later, when the company responded to the Director's request for additional evidence (RFE). The RFE noted the one-year experience requirement on the labor certification and instructed the company to demonstrate the offered job's need for a skilled worker. Thus, because of the RFE's derogatory information, the Petitioner may have decided to seek approval under a different visa category than it originally intended. The Director therefore properly required the company to demonstrate the inadvertence of

its claimed clerical error. The Petitioner did not submit evidence supporting counsel's claim of the clerical mistake in Part 2 of the Form I-140. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)) (holding that assertions of counsel do not constitute evidence). Thus, the Director's denial complies with USCIS policy.

The Petitioner also contends that a clerical error is the only reasonable explanation for the marking of the wrong visa category box on the Form I-140. The company asserts that intentionally selecting the incorrect visa category would not have benefited the business because: 1) at the time of the petition's filing, immigrant visas for both skilled and other workers were available; 2) evidence consistently states the offered job's need for only one year of experience; and 3) neither the Petitioner nor the Beneficiary had reason to risk the petition's denial.

As previously discussed, however, USCIS policy seeks to prevent a petitioner from using one petition to request multiple visa preference classifications. Thus, the Agency need not find any additional benefit that a petitioner would derive from requesting a different visa category. On the contrary, to justify consideration of a different visa category, the petitioner bears the burden of demonstrating the occurrence of a claimed clerical error. *See Matter of Chawathe*, 25 I&N Dec. at 375 ("Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.")

Citing a 2018 decision of ours, the Petitioner further contends that it may amend information on a petition before its adjudication. The non-precedent decision, however, does not bind us in this matter. *See* 8 C.F.R. § 103.10(b) (stating that DHS employees need only follow precedent decisions of the Board of Immigration Appeals and Attorney General in proceedings involving the same issues). Also, the decision's facts distinguish it from this case. In our 2018 decision, a director refused to amend a Form I-140 petition after a petitioner claimed its inadvertent selection of an incorrect immigrant visa category on the form. The director's decision quoted language from the petitioner's support letter that did not appear to justify the denial. We therefore remanded the matter "[i]n view of the Director's lack of clarity in his decision." Here, the record does not indicate a similar lack of clarity in the Director's decision. Thus, even if the 2018 decision bound us, its differing facts would distinguish it from the case before us.

Finally, the Petitioner asserts that "the proper exercise of due process requires that those seeking an immigration benefit be given the opportunity to correct errors prior to adjudication." Under the Fifth Amendment, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."

The company, however, has not established its possession of constitutionally protected property or liberty interests in the petition. *See Diomande v. Gonzales*, 247 F. App'x 450 (4th Cir. 2007) (rejecting a noncitizen's claim that an Immigration Judge violated his Due Process rights by refusing to review revocation of an immigrant visa petition for him). Thus, the record does not demonstrate the viability of the Petitioner's Due Process claim. Even if the company established a valid claim, we would lack jurisdiction to consider the constitutionality of the Agency's rules. *See Matter of J.J. Rodriguez*

Rodriguez, 27 I&N Dec. 762, 764 n.3 (BIA 2020) (finding it "well-settled" that an administrative agency lacks jurisdiction to rule on the constitutionality of statutes or rules it administers).

III. CONCLUSION

The Director's refusal to change the immigrant visa category on the Petitioner's Form I-140 complies with USCIS policy. Thus, the accompanying labor certification does not demonstrate the offered job's need for a skilled worker in the requested immigrant visa category. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.