U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24547120

Date: JAN. 27, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, a seller and trader of industrial power generators, seeks to permanently employ the Beneficiary as a market research analyst. The company requests his classification under the third-preference immigrant visa category as a professional. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

After first granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that, contrary to the offered position's job requirements on the accompanying certification from the U.S. Department of Labor (DOL), the Petitioner did not demonstrate the Beneficiary's possession of a U.S. bachelor's degree.

On appeal, the Petitioner asserts that, despite a clerical error on the labor certification to the contrary, the company intended to also accept a foreign equivalent of a U.S. bachelor's degree for the job. The Petitioner argues that: U.S. Citizenship and Immigration Services (USCIS) has authority to correct the error; the Director improperly disregarded the company's claim of ineffective assistance of counsel; and USCIS effectively invalidated the labor certification without a required finding of fraud or willful misrepresentation.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We exercise de novo, appellate review. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we conclude that USCIS lacks power to correct or disregard a purported clerical error on a DOL-issued labor certification if it creates an unambiguous job requirement. We will therefore dismiss the appeal.

I. LAW

Immigration as a professional 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 an 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)(A), (C).

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.

"[A]t any time" before a beneficiary obtains lawful permanent residence, USCIS may revoke a petition's approval for "good cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS properly issues a notice of intent to revoke (NOIR) a petition if the unrebutted and unexplained record would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). The Agency properly revokes a petition's approval if a petitioner does not respond to a properly issued NOIR, or their NOIR response does not overcome all alleged revocation grounds. *Id.* at 451-52.

II. ANALYSIS

A. The Required Education

A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is August 18, 2021, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

When assessing a beneficiary's qualifications for an offered position, USCIS must examine the job-offer portion of an accompanying labor certification to determine the job's minimum requirements. USCIS may neither ignore a certification term nor impose unstated requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The Petitioner's labor certification states the minimum requirements of the offered position of market research analyst as a U.S. bachelor's degree in business administration and two years of experience in the job offered. The certification indicates the Petitioner's acceptance of neither a foreign equivalent of a U.S. baccalaureate degree nor experience in a related occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date, a university in Lebanon awarded him a bachelor of arts degree in "business studies with systems practice." The Petitioner submitted copies of his diploma and a transcript of his university courses.

The Director's NOIR, however, noted the Petitioner's rejection on the labor certification of a foreign equivalent of a U.S. bachelor's degree. Part H.9 of the certification asked the Petitioner, "Is a foreign educational equivalent acceptable?" and the form provided two response box options: one marked

"Yes;" and the other marked "No." The company checked the box marked "No." Because the Petitioner's evidence shows the Beneficiary's receipt of a foreign bachelor's degree, the NOIR informed the company of the Director's intent to revoke the petition's approval.

In the Petitioner's NOIR response, the company's chief executive officer (CEO) stated that, when preparing the labor certification application, counsel inadvertently indicated the company's rejection of a foreign equivalent of a U.S. baccalaureate. The CEO described the purported error as "obvious," citing evidence of the company's intent to employ the Beneficiary in the offered position and his possession of a foreign bachelor's degree. The CEO said that, when advertising for U.S. workers during the labor certification process, the company did not reject job applicants with foreign degrees.

Signatures on immigration applications, however, establish strong presumptions that the signatories knew the filings' contents and consented to them. *Matters of Valdez*, 27 I&N Dec. 496, 499 (BIA 2018). The Petitioner's labor certification contains the signatures of the company's CEO and counsel. The CEO, however, stated that he signed the certification "without examining every single answer." Instead, he said he relied on counsel to have properly completed the application. Counsel stated that "his office" mistakenly checked the box at part H.9 of the labor certification indicating the company's rejection of a foreign baccalaureate equivalency. Counsel described the mistake as an "obvious typographical error" and asked USCIS to excuse it.

The Director, however, revoked the petition's approval, noting that the Petitioner's CEO and counsel swore under penalty of perjury on the labor certification to their review of the application and the truth and accuracy of its contents. The Director also found the certification's plain language binding on USCIS and stated that excusing the purported clerical error would improperly allow the Petitioner to materially change the petition after its filing. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (AAO 1998).

The Director correctly revoked the petition's approval. As the Director concluded, USCIS must read and apply "the plain language" of a labor certification. *See Rosedale Linden Park Co. v. Smith*, 595 F. Supp. 839, 834 (D.D.C. 1984). Part H.9 of the certification unambiguously indicates the Petitioner's exclusion of a foreign baccalaureate as a qualification for the offered position, and the record lacks evidence of the Beneficiary's possession of a U.S. degree. Also, the Petitioner did not show or even assert that DOL audited the labor certification application and acknowledged the claimed, typographical error before certifying the filing.

On appeal, the Petitioner cites the Act and regulations as authority for USCIS's ability to excuse the purported clerical error on the labor certification. The company notes the Agency's discretion to accept an untimely nonimmigrant visa extension application/petition if, among other things, "[t]he delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances." 8 C.F.R. § 214.1(c)(4). Also, although noncitizens who do not continuously maintain lawful status after their U.S. entries generally cannot adjust their statuses, USCIS may excuse status lapses if they were "through no fault of [the noncitizens'] or for technical reasons." Section 245(c)(2) of the Act. In light of these provisions, the Petitioner asserts that USCIS can and should excuse the claimed clerical error on the company's labor certification. The Petitioner contends that counsel's inadvertent error and the existence of "extraordinary circumstances" are "undisputed."

The cited provisions, however, do not apply in these proceedings. They address nonimmigrant visa extension applications/petitions and adjustment applications, not immigrant visa petitions.

Also, the Petitioner claims it checked the wrong box on a labor certification application, a non-USCIS form that the Agency generally lacks authority to adjudicate.[1] Had counsel made a clerical error on the Petitioner's Form I-140, Petition for Alien Workers, USCIS may have had authority to excuse or correct the mistake. For example, under certain circumstances, the Agency may correct mischosen immigrant visa categories on Forms I-140. USCIS, "Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Workers," https://www.uscis.gov/forms/all-forms/petition-filing-and-processing-procedures-for-form-i-140-immigrant-petition-for-alien-workers#Requesting. As discussed above, however, Congress authorized DOL - not USCIS - to regulate and adjudicate labor certifications. Section 212(a)(5)(A)(i) of the Act. "[D]eterminations vested by statute with one agency are not normally subject to horizontal review by a sister entity, absent congressional authorization to that effect." *Madany*, 696 F.2d at 1012. Job requirements on labor certifications affect determinations regarding the existence of U.S. workers "who are able, willing, qualified . . . and available" for offered positions. Section 212(a)(5)(A)(i)(I) of the Act. We therefore lack authority to change or disregard unambiguous job requirements on a DOL-issued labor certification. Rather, to amend its part H.9 indication on the labor certification, the Petitioner must contact DOL. *See Matter of Gen. Elec. Co.*, 2011-PER-01818, *3 (BALCA Apr. 15, 2014) (citation omitted) (ruling that DOL has discretion to retroactively amend contents of a labor certification).

The Petitioner also argues that the Director improperly disregarded its claim of ineffective assistance of counsel. In its NOIR response, the Petitioner contended that, but for counsel's mistaken indication on the labor certification of the company's rejection of foreign baccalaureate equivalencies, USCIS would have approved the petition.

We acknowledge USCIS' consideration of claims of ineffective assistance of counsel in matters over which the Agency has jurisdiction. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). But counsel's claimed error occurred in DOL labor certification proceedings. As discussed above, we lack authorization to change or disregard unambiguous job requirements stated on DOL-issued labor certifications. Thus, the Petitioner must address its ineffective assistance of counsel claim with DOL.

Also, even if USCIS could consider the Petitioner's ineffective assistance of counsel claim, the claim would fail. The Petitioner has not established that counsel's purported error on the labor certification prejudiced the company. *See Matter of Lozada*, 19 I&N Dec. at 638 (requiring a party alleging ineffective assistance of counsel to show that the attorney's performance prejudiced the party). Assuming the Petitioner's acceptance of a foreign equivalent of a U.S. bachelor's degree, the record lacks evidence that the Beneficiary's foreign degree equates to a U.S. baccalaureate. The Petitioner omitted an evaluation of his degree or other proof of its claimed U.S. equivalency. Thus, the record does not demonstrate that, but for counsel's purported error, USCIS would have approved the petition. For this additional reason, the Petitioner's ineffective assistance of counsel claim fails.

[1] DOL delegated USCIS authority to adjudicate labor certification applications in immigrant petition proceedings involving requests for Schedule A classification. 20 C.F.R. § 656.15(e). In Schedule A proceedings, however, DOL has pre-determined that the United States lacks sufficient workers for the offered occupations and that the permanent employment of noncitizens in the occupations would not harm U.S. workers similarly employed. 20 C.F.R. § 656.5.

Finally, the Petitioner asserts that, by declining to recognize or remedy the company's claimed clerical error on the labor certification, USCIS has effectively invalidated the certification. The Petitioner notes that USCIS may invalidate a labor certification only upon finding "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d). Because USCIS did not find fraud or willful misrepresentation involving the Petitioner's labor certification, the company argues that USCIS must excuse the clerical error on the certification.

The Petitioner makes a creative argument. But the facts of the case undermine the company's contention. The revocation decision shows that USCIS did not invalidate the Petitioner's labor certification. Rather, the Agency found insufficient evidence that the Beneficiary meets the minimum educational qualifications listed on the labor certification. Thus, even if similarities exist between the petition's revocation and an invalidation of the labor certification, USCIS did not invalidate the certification and thus need not find fraud or willful misrepresentation. The Petitioner's argument is therefore unpersuasive.

The Petitioner has not demonstrated the Beneficiary's educational qualifications for the offered position. We will therefore affirm the revocation of the petition's approval.

B. The Required Experience

Although unaddressed by the Director, the Petitioner also did not demonstrate the Beneficiary's qualifying experience for the offered position. As indicated above, the labor certification states the minimum experience requirements of the offered position of market research analyst as two years "in the job offered." On a certification, the phrase "in the job offered" means experience performing the duties of the offered position stated on the certification. *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *4 (BALCA Oct. 24, 2011).

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained the required qualifying experience while working for a motor vehicle parts company in Lebanon for more than seven years, from July 2012 through March 2020. The Beneficiary stated that the company employed him in the following positions:

- "Sales training," from July 2012 to March 2014;
- "Marketing specialist," from March 2014 to August 2017; and
- "Sales manager," from August 2017 to March 2020.

To establish claimed, qualifying experience, a petitioner must submit a letter from a beneficiary's former or current employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must include the employer's name, title, and address, and describe the beneficiary's experience. *Id.*

The Petitioner submitted a letter from the Beneficiary's claimed former employer stating the company's employment of him from 2012 to March 2020 and his development of skills in "market research." But, contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the letter does not sufficiently describe his experience or job duties. The document does not demonstrate that he gained at least two years of experience performing the duties "in the job offered." The letter therefore does not establish the Beneficiary's claimed qualifying experience for the offered position.

The letter also contains inconsistencies casting doubt on the Beneficiary's claimed, qualifying experience. The document states his start at the company "as a trainee in our marketing department." But the record does not establish whether that is the same position as "sales training" listed on the labor certification. If so, while the certification states the Beneficiary's employment in the job for more than a year, the letter describes "a training period of 6 months." *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies). Consistent with the labor certification, the letter states the Beneficiary's promotion to the position of "sales manager." But the document does not indicate when the promotion occurred and, contrary to the Beneficiary's attestation on the labor certification, does not specify his prior employment as a "marketing specialist." Also, the Petitioner did not indicate which of the Beneficiary's former position(s) qualifies him for the offered job. Thus, at the time of the NOIR's issuance, the Petitioner did not demonstrate the Beneficiary's qualifying experience for the offered position.

In any future filings in this matter, the Petitioner must provide a letter from the Beneficiary's employer sufficiently describing the Beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The company must also resolve the inconsistencies between the employer's letter and the labor certification with independent, objective evidence of the Beneficiary's claimed qualifications. *See Matter of Ho*, 19 I&N Dec. at 591.

III. CONCLUSION

Contrary to the clear, unambiguous job requirement on the labor certification, the Petitioner did not demonstrate the Beneficiary's possession of a U.S. bachelor's degree. We will therefore affirm the revocation of the petition's approval.

ORDER: The appeal is dismissed.