U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25053056

Date: JAN. 31, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner operates a nursing home and seeks to permanently employ the Beneficiary as a registered nurse. The company requested her 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). This category allows a prospective U.S. employer to sponsor a noncitizen with a bachelor's degree for lawful permanent resident status. *Id.*

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the offered position's required need for a professional.

On appeal, the Petitioner claims that, on the Form I-140, Immigrant Petition for Alien Workers, counsel inadvertently requested the Beneficiary's classification as a professional. The company seeks the form's amendment to indicate the purported intended immigrant visa category, which does not require a bachelor's degree. The company argues that: the form's instructions were "misleading;" the Director did not issue a request for additional evidence (RFE) allowing the company to correct its clerical error on the form; both professionals and skilled workers received immigrant visas from the same, allocated amount; the petition meets all other requirements for the requested benefit; and the appeal's denial would cause "significant harm" to residents of the company's facility.

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 affirm the Director's denial and conclude that USCIS guidance bars amendment of an immigrant visa category after a decision's issuance. We will therefore dismiss the appeal.

I. LAW

Immigration as a professional usually follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to USCIS. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Finally,

if USCIS grants a petition, a noncitizen beneficiary may apply abroad for an immigrant visa or, if eligible, "adjustment of status" in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

DOL, however, has already determined that the United States lacks sufficient nurses and that permanent employment of noncitizens in these "Schedule A" occupations will not harm the wages or working conditions of U.S. workers in similar positions. 20 C.F.R. § 656.5. Thus, DOL authorizes USCIS to adjudicate Schedule A labor certification applications in immigrant visa petition proceedings. 20 C.F.R. § 656.15(a). USCIS therefore rules not only on this petition but also on its accompanying Schedule A labor certification application. *See* 20 C.F.R. § 656.15(e) (describing USCIS's labor certification determinations in Schedule A proceedings as "conclusive and final").

II. ANALYSIS

A. The Position's Need for a Professional

On the Form I-140, the Petitioner requested the Beneficiary's classification as a "professional." The term professional, in part, means a noncitizen holding at least a U.S. bachelor's degree or a foreign equivalent degree. 8 C.F.R. § 204.5(l)(2).[1] For a professional, the job offer portion of a Schedule A labor certification application "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i).

Consistent with 8 C.F.R. § 204.5(l)(2), the Petitioner demonstrated the Beneficiary's possession of a U.S. bachelor's degree in the offered position's required field of nursing. But, contrary to 8 C.F.R. § 204.5(l)(3)(i), the company's Schedule A application states that the job requires an associate's degree in nursing without any training or experience. Thus, the Petitioner's labor certification application did not demonstrate the offered position's need for a professional, and, under 8 C.F.R. § 204.5(l)(3)(i), the Director correctly denied the petition.

The Petitioner asserts its intent to request the Beneficiary's classification not as a professional, but as a "skilled worker." A skilled worker means a noncitizen able to perform work requiring at least two years of training or experience. Section 203(b)(3)(A)(i) of the Act.[2] The company states that counsel inadvertently marked the wrong immigrant visa category in part 2 of the Form I-140. The Petitioner therefore requests the form's amendment.

USCIS guidance, however, bars amendment of a requested immigrant visa category at this stage of petition proceedings. Upon receipt of a Form I-140, USCIS creates an electronic record and mails a receipt notice to a petitioner and, if applicable, their authorized representative. 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. The Agency advises a petitioner to ensure that a receipt notice indicates the correct requested visa category. *Id.* If a receipt notice reflects an incorrect category, a petitioner should immediately call the USCIS National Customer Service Center "to request that

[1] A professional must also be a member of "the professions." *Id.* The term "profession" means one of the occupations listed in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), or requiring at least a U.S. bachelor's degree or a foreign equivalent degree for entry. 8 C.F.R. § 204.5(k)(2).

[2] "Relevant post-secondary education may be considered as training." 8 C.F.R. § 204.5(l)(2).

[USCIS] change the visa classification before making a decision" on the petition. *Id.* A petitioner may request amendment to its requested visa classification to correct clerical errors by the business or USCIS. *Id.* But the Agency reiterates: "We cannot change the visa category if we have already made a decision on your Form I-140." *Id.*

The record shows that, contrary to USCIS guidelines, the Petitioner did not notify the Agency of the purported incorrect visa category on the form until after the Director's decision. As USCIS guidance stresses, the Agency cannot amend a petition after a decision's issuance. Also, the Petitioner has not demonstrated that USCIS' receipt notice misidentified the listed visa category as skilled worker. We therefore decline to grant the Petitioner's amendment request.

On appeal, the Petitioner argues that we should allow amendment of the company's Form I-140 because the form's instructions on selecting an immigrant visa category are "misleading." The company asserts that the instructions suggest that a beneficiary's credentials - rather than the job requirements of an offered position - determine the appropriate visa category to request. Because the Beneficiary has a bachelor's degree in nursing, the Petitioner contends that it "logical[ly]" selected the professional category for her classification.

Part 2 of the Form I-140 does not specify that a professional position must require a bachelor's degree. The form merely states, "This petition is being filed for" and asks a petitioner to mark one of eight boxes corresponding to employment-based immigrant visa categories. But the "General Requirements'" section of the separate form instructions states that "Initial Evidence" for a professional petition must include "[e]vidence that a baccalaureate degree is required for entry into the occupation." USCIS, All Forms, "I-140, Immigrant Petition for Alien Workers," https://www.uscis.gov/i-140. USCIS therefore provided sufficient guidance on how to select the immigrant visa category on the Form I-140. Also, on appeal, the Petitioner repeatedly describes the form's purported mistake as a "typographical error." The record therefore indicates that the Petitioner inadvertently selected the wrong visa category, not that the language on the Form I-140 misled the company.

The Petitioner also notes that USCIS did not issue an RFE or notice of intent to deny (NOID) the petition notifying the company of the purported incorrect visa category and allowing the company an opportunity to correct the error. Citing a 2016, non-precedent decision of ours, the Petitioner claims that, in past cases, USCIS has given petitioners opportunities to correct typographical errors. The company also notes that, in 2021, USCIS changed its policy on RFEs, recommending their issuance:

> when additional evidence could demonstrate eligibility for an immigration benefit. This policy will ensure that benefit requestors are given an opportunity to correct innocent mistakes and unintentional omissions and will help protect both benefit requestors and the agency from expending additional resources unnecessarily.

"USCIS Policy Alert" on "Requests for Evidence and Notices of Intent to Deny," (Jun. 9, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210609-RFEs%26NOIDs.pdf.

As the Petitioner argues, USCIS favors issuances of notices when additional evidence could demonstrate eligibility. But the Agency does not require initial issuance of RFEs or NOIDs in all circumstances.

> [I]f the benefit request does not have a legal basis for approval, and the officer determines that there is no possibility that additional information or explanation will establish a legal basis for approval, then the officer generally should deny the benefit request without first issuing an RFE or NOID.

1 *USCIS Policy Manual* E.(6)(F)(1), (9)(B)(1), https://www.uscis.gov/policy-manual; *see also* 8 C.F.R. § 103.2(b)(8)(iii) ("If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the benefit request for ineligibility.")

Consistent with regulations and USCIS policy, the Petitioner's filing lacked a legal basis for approval, and additional information or explanation would not have established an approval basis. The Form I-140 requested the Beneficiary's classification as a professional. But, contrary to 8 C.F.R. § 204.5(l)(3)(i), the company's Schedule A application stated the offered position's need for only an associate's degree. Thus, under the requested immigrant visa category, the petition lacked a legal basis for approval. The Petitioner argues that, in response to an RFE or NOID, the company could have submitted evidence of its inadvertent selection of the wrong visa category. As discussed above, however, USCIS guidance requires a Form I-140 petitioner to check its receipt notice and immediately inform the Agency of an incorrect visa category before a petition's denial. *See* 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. The record does not indicate the Petitioner's immediate notification of USCIS of the purported incorrect visa category. Thus, neither DHS regulations nor USCIS guidance required the Director to send the Petitioner a RFE or NOID before denying the petition.

The Petitioner argues that "there is no practical difference" between the professional and skilled worker categories because successful beneficiaries in both groups receive visas from the same allocated amount. *See* sections 203(b)(3)(A), (B) of the Act (distributing up to 28.6% of the worldwide level of employment-based, immigrant visas to skilled workers, professionals, and "other workers," with no more than 10,000 of that amount designated for other workers). But the Act and DHS regulations require skilled workers and professionals to meet different criteria. *See* section 203(b)(3)(A)(i), (ii), (iii) of the Act; 8 C.F.R. § 204.5(l)(2). For example, as this case illustrates, unlike a position for a skilled worker, a professional job must require a baccalaureate degree. 8 C.F.R. § 204.5(l)(3)(i). Thus, there is a practical difference between a skilled worker and a professional.

The Petitioner further contends that: if not for the company's inadvertent selection of an incorrect visa category, USCIS would have approved the petition; and the appeal's denial would significantly harm residents of the company's facility. The company states that the Beneficiary is the only registered nurse at its facility, which cares for elderly and disabled residents who are especially susceptible to the COVID-19 virus.

Contrary to the Petitioner's contention, however, another deficiency prevents the petition's approval: as we will discuss further below, the company did not demonstrate its ability to pay the offered position's proffered wage. *See* 8 C.F.R. § 204.5(g)(2). But even assuming the Petitioner's satisfaction of all other petition requirements and the claimed hardships to residents of the company's facility, amendment of the company's petition after the decision's issuance would violate USCIS guidance. Thus, we decline to grant the Petitioner's requested amendment.

The Petitioner's Schedule A application does not demonstrate the offered position's need for a professional. We will therefore affirm the petition's denial.

B. Ability to Pay the Proffered Wage

As indicated above, the Petitioner did not demonstrate its ability to pay the offered position's proffered wage. A petitioner must establish its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

The Petitioner's Schedule A application states the proffered wage of the offered position of registered nurse as $27 to $30 an hour or, based on a 40-hour work week, $56,160 to $62,400 a year. The petition's priority date is August 23, 2021, the petition's filing date. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner's filing lacks required evidence of the company's ability to pay the proffered wage. Neither copies of annual reports, federal tax returns, nor audited financial statements accompany the petition. *See* 8 C.F.R. § 204.5(g)(2). The Petitioner submitted a copy of an income statement from its management company for 2020, reflecting net income of $76,681. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record does not establish that the statement was "audited." The statement therefore does not constitute required evidence.

The chief executive officer (CEO) of the management company also asserted the Petitioner's ability to pay the proffered wage. But a statement from a financial officer of a petitioner may only establish its ability to pay a proffered wage if it employs at least 100 people. 8 C.F.R. § 204.5(g)(2). The Petitioner's Form I-140 states the company's employment of 52 people. The CEO's statement therefore does not establish the Petitioner's ability to pay.

In any future filings in this matter, the Petitioner must submit required evidence demonstrating its continuing ability to pay the offered position's proffered wage, from the petition's 2021 priority date onward.

III. CONCLUSION

The Petitioner's Schedule A application does not demonstrate the offered position's need for a professional, and USCIS guidance bars amendment of a requested immigrant visa category after a decision's issuance. We will therefore the affirm the filing's denial.

ORDER: The appeal is dismissed.