U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27443157

Date: OCT. 12, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a retailer, seeks to employ the Beneficiary as a sales clerk. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* 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, concluding that the record did not establish that the Beneficiary has the qualifications required for the position. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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).

As noted above, the Director found that the record did not establish that the Beneficiary met the minimum requirements for the proffered position. Specifically, the Director concluded that "the [B]eneficiary's work experience and college degree did not seem to be related to the job being offered." 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 level of education required for the proffered position is an associate degree in "any" major field of study, or a foreign equivalent. The ETA Form 9089 also indicates that a minimum of 12 months of experience in the job offered may be accepted instead of a qualifying degree. Part H.14 of the ETA Form 9089 specifically describes the position's minimum requirements as "1 year experience *or* Associate's degree or higher (or foreign equivalent)" (emphasis added). Other documents in the record, such as job postings published in the [redacted] newspaper, similarly state that the position requires "1yr exp *or* Associate's degree or higher (or foreign equiv.)," indicating that the position requires a minimum of 12 months of experience in the job offered, as opposed to a minimum of two years of training or experience (emphasis added).

On appeal, the Petitioner asserts that the Beneficiary's "experience is irrelevant to his eligibility for this position" because the position's minimum requirement is either an associate degree, the foreign equivalent of an associate degree, or 12 months of experience in the position; and because the Beneficiary's degree qualifies him for the position. The Petitioner further asserts that, because the position's requirements include an associate degree, which "requires at least two years of education/training," it also "meets the requirement of classification under the EB-3 skilled worker category," notwithstanding the alternative minimum requirement of only 12 months of experience in the position. The record contains a copy of a degree from the [redacted] Institute of Technology, [redacted] in India, awarding the Beneficiary "the degree of bachelor of science in electrical & electronic engineering." The degree bears several dates, indicating that, although the degree itself is

dated "March 05, 1998," the "final academic session" was "1991-92" and the "date of passing" was "April 1996." The record also contains a copy of an academic transcript corresponding to the degree, and an academic evaluation that opines the Beneficiary's degree is equivalent to "a bachelor's degree in electrical engineering . . . from a regionally accredited institution in the United States."

The Petitioner correctly asserts that the Beneficiary's degree equivalent to a bachelor's degree in electrical engineering satisfies the ETA Form 9089's requirement of "1 year experience *or* Associate's degree or higher (or foreign equivalent) . . . in any specialty," regardless of any experience the Beneficiary may have (emphasis added). Thus, the Petitioner has established that the Beneficiary is qualified for the offered job, and we withdraw the Director's decision on that issue. However, the petition cannot be approved under the requested skilled worker classification. Because the ETA Form 9089 indicates that only 12 months of experience in the job offered may be accepted instead of a degree—of any kind—as the minimum qualification for the position, it does not appear to support classifying the position as a "skilled worker," which requires, in relevant part, a minimum of two years of training or experience.[1] *See* 8 C.F.R. § 204.5(l)(2), (l)(3)(ii)(B). Because the Director did not specifically state that a basis for denial is that the position itself does not support classification as a "skilled worker," we will remand the matter for the entry of a new decision. The Director may request any additional evidence considered pertinent to the new determination regarding whether the position qualifies for classification as a "skilled worker," and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[1] In contrast, the regulations define an "other worker," in relevant part, as a qualified noncitizen who is capable of performing "unskilled labor (requiring less than two years training or experience)." *See* 8 C.F.R. § 204.5(l)(2).