U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28623691

Date: SEP. 28, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a provider of information technology services, seeks to permanently employ the Beneficiary as a programmer analyst. 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). U.S. businesses may sponsor noncitizens for permanent residence in this category to work in jobs requiring at least two years of training or experience. *Id.*

The Director of the Nebraska Service Center denied the petition. The Director concluded that, contrary to the offered job's requirements, the Petitioner did not demonstrate the Beneficiary's possession of a bachelor's degree. We affirmed the Director's decision, dismissing the Petitioner's appeal and its following motion to reconsider. *See In Re: 24605390* (AAO Feb. 10, 2023).

The matter returns to us on a second motion to reconsider. The Petitioner contends that we disregarded its stated acceptance of a baccalaureate equivalent and evidence that the Beneficiary has that equivalent.

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). Upon review, we conclude that the company has not demonstrated our purported misinterpretation of the offered job's requirements. We will therefore dismiss the appeal.

I. LAW

A motion to reconsider must establish that our prior decision misapplied law or U.S. Citizenship and Immigration Services (USCIS) policy based on the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion must challenge only our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant a filing that meets these requirements and demonstrates eligibility for the requested benefit.

II. ANALYSIS

A. The Beneficiary's Professional Certificate

The Petitioner must demonstrate that, based on the terms of its certified labor certification, the Beneficiary has a U.S. bachelor's degree - or a foreign equivalent degree - in a field related to technology, business, mathematics, science, or engineering. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring a skilled worker petition to include evidence that a beneficiary meets all requirements listed on an accompanying labor certification). The offered position of programmer analyst also requires one year of experience "in the job offered" or in "[a]ny information technology related occupation." *Id.* [1]

The company demonstrated that the Beneficiary's certificate from the [redacted] in India equates to a U.S. bachelor of science degree in electronics engineering. The company therefore contends that the Beneficiary meets the offered job's educational requirements.

As our prior decision indicates, however: "Evidence of a baccalaureate degree shall be in the form of an official *college or university* record." 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). The Petitioner submitted records from [redacted], a professional society devoted to the advancement of science and technology. *See* [redacted] "About [redacted]" www.[redacted]html. Contrary to the regulation, the company has not demonstrated that [redacted] is a "college or university." Therefore, the company has not established that the Beneficiary has the required bachelor's degree for the offered job.

If the Petitioner intended to accept a baccalaureate equivalent based on a credential that a college or university did not issue, the company should have so indicated on its labor certification application. *See Rosedale & Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) ("The Court - like the [immigration service] - must examine the certified job offer exactly as it is completed by the prospective employer.") In part H.4 of the application, the company could have marked the job's required educational level as "[o]ther" rather than "[b]achelor's." Or, in part H.8 of the certification, the company could have indicated its acceptance of an alternate combination of education and experience.

The Petitioner contends that 8 C.F.R. § 204.5(l)(3)(ii)(B) - rather than 8 C.F.R. § 204.5(l)(3)(ii)(C) - should apply to this case. In relevant part, 8 C.F.R. § 204.5(l)(3)(ii)(B) states: "If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification." In contrast, 8 C.F.R. § 204.5(l)(3)(ii)(C) states:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and

[1] A skilled worker position must require at least two years of training or experience. Section 203(b)(3)(A)(i) of the Act. But "[r]elevant post-secondary education may be considered as training." 8 C.F.R. § 204.5(l)(2) (defining the term "skilled worker").

by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record.

The Petitioner argues that, because it requested the Beneficiary's classification as a skilled worker, only 8 C.F.R. § 204.5(l)(3)(ii)(B) applies, and the company need not demonstrate, as 8 C.F.R. § 204.5(l)(3)(ii)(C) requires, that "a college or university" issued her degree.

We agree with the Petitioner that, because the petition requests skilled worker classification, 8 C.F.R. § 204.5(l)(3)(ii)(B) applies. But that regulation still requires the company to demonstrate that the Beneficiary "meets the educational, training or experience, and any other requirements of the individual labor certification." 8 C.F.R. § 204.5(l)(3)(ii)(B). As previously discussed, the labor certification states that the offered job requires a U.S. bachelor's degree or a foreign equivalent degree. The Petitioner submitted evidence that the Beneficiary's [redacted] certificate *equates* to a U.S. bachelor's degree. But the company has not demonstrated that, as the labor certification requires, the certificate *is* a U.S. bachelor's degree or a foreign equivalent degree. The Petitioner therefore has not demonstrated that the Beneficiary meets the offered position's minimum educational requirements.

For the foregoing reasons, the Petitioner has not established that the Beneficiary meets the offered job's educational requirements as listed on the labor certification. We will therefore dismiss this portion of the Petitioner's motion.

B. The "*Kellogg* Language"

The Petitioner also contends that we improperly disregarded the language in part H.14 of the labor certification stating the company's acceptance of "[a]ny suitable combination of education, training, or experience." The company argues that this language indicates its acceptance of the baccalaureate equivalent that the Beneficiary received from [redacted] through a combination of education and training.

As our prior decision explains, the Petitioner's language in part H.14 of the labor certification is the same language DOL requires "[i]f the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements." 20 C.F.R. § 656.17(h)(4)(ii). Immigration practitioners call this language "*Kellogg* language," referring to the Board of Alien Labor Certification Appeals Board (BALCA) decision that first required it. *See Matter of Francis Kellogg*, 94-INA-465 (BALCA Feb. 2, 1998) (*en banc*).

Consistent with 20 C.F.R. § 656.17(h)(4)(ii), the record shows that the Petitioner employed the Beneficiary at the time of the labor certification application's filing. Also, she potentially qualifies for the job by virtue of her experience in the alternate job occupation, as the record does not establish her experience "in the job offered." Thus, the record identifies the language in part H.14 of the labor certification as *Kellogg* language required by DOL.

Because DOL requires *Kellogg* language on labor certifications under these circumstances, USCIS does not interpret the language literally to indicate a petitioner's acceptance of lesser qualifications than stated in primary or alternate requirements on the labor certification. Otherwise, the language would render the primary and alternate requirements meaningless, and USCIS could not determine a

job's actual minimum requirements. We therefore decline to interpret the Petitioner's *Kellogg* language as indicating its acceptance of the Beneficiary's baccalaureate equivalent from [redacted].

Citing a U.S. district court decision, the Petitioner further contends that we must defer to its interpretation of the job's educational requirements on the labor certification. *See SnapNames.Com, Inc. v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In *SnapNames.com*, the court held that, in professional and advanced degree cases, where the Act and regulations require a beneficiary to hold at least a baccalaureate degree, USCIS properly concluded that a single U.S. bachelor's degree or its foreign equivalent is required. *SnapNames.com*, 2006 WL 3491005 at **10-11. But, in the context of a skilled worker petition, the court rejected USCIS' conclusion that labor certification criteria of four years of college and a "B.S. or foreign equivalent" required a single bachelor of science degree and excluded a combination of educational experiences as the petitioner contended. *Id.* at *8.

We need not follow *SnapNames.com*, however, as a U.S. district court case binds only the parties in that matter. *See Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). Moreover, *SnapNames.com*'s facts distinguish it from the Petitioner's case. The petitioner in *SnapNames.com* submitted a letter from its chief financial officer stating the company's intended meaning of the phrase "foreign equivalent" on the labor certification. *SnapNames.com*, 2006 WL 3491005 at *8 (describing the letter as "strong, undisputed evidence" of the petitioner's intent). In contrast, the Petitioner has not submitted evidence of its intent in drafting the language in part H.14 or elsewhere on its labor certification.[2] Moreover, in *SnapNames.com*, the labor certification application was filed on a prior form, Form ETA 750, which, unlike the ETA Form 9089 used here, did not clearly allow a petitioner to set forth an alternate combination of education and experience or alternate requirements. Further, as previously discussed, parts H.4 and H.8 of the labor certification indicate the company's acceptance of only a U.S. bachelor's degree or a foreign equivalent degree. The Petitioner therefore has not demonstrated that we misinterpreted the language on the labor certification.

III. CONCLUSION

The Petitioner has not demonstrated our misapplication of law or USCIS policy. The company also has not otherwise established eligibility for the requested benefit. We will therefore affirm the appeal's dismissal.

ORDER: The motion to reconsider is dismissed.

[2] Counsel's unsubstantiated assertions do not constitute evidence. *See e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").