U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-F-, INC.

DATE: NOV. 10, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a meat wholesaler and distributor, seeks to permanently employ the Beneficiary as an operation research analyst under the immigrant classification of member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the record did not establish the Beneficiary's qualifying experience for the offered position and the requested classification. Accordingly, he denied the petition on April 2, 2015.

The appeal is properly filed and alleges specific errors of fact and law. The record documents the case's procedural history, which will be incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record, including new evidence properly submitted on appeal.[1]

I. THE BENEFICIARY'S QUALIFYING EXPERIENCE

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of the offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See*

[1] The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow submission of additional evidence on appeal.

K.R.K. Irvine, Inc. v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

A labor certification accompanying a petition in the requested classification must also require the services of an advanced degree professional. 8 C.F.R. § 204.5(k)(4)(i). The labor certification therefore must require an advanced degree or the equivalent. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" to mean a U.S. academic or professional degree or a foreign equivalent degree above that of a baccalaureate, or a U.S. baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty).

In the instant case, the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), states the minimum requirements of the offered position of operation research analysis as a U.S. Bachelor's degree or a foreign equivalent degree in any field, plus at least 60 months of experience in the job offered. The petition's priority date is July 16, 2014, the date the U.S. Department of Labor (DOL) accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The Beneficiary attested on the labor certification to about 65 months of post-baccalaureate qualifying experience at [redacted] in South Korea.[2] She stated her employment as an:

- Operation research analyst for 27 hours per week from September 1, 1989 to August 31, 1993;[3]
- Operation research analyst for 40 hours per week from March 1, 1987 to August 31, 1989; and
- Assistant operation research analyst for 40 hours per week from March 1, 1986 to February 28, 1987.

The labor certification states no other related employment of the Beneficiary.

A petitioner must support a beneficiary's claimed qualifying experience with letters from former employers. 8 C.F.R. § 204.5(g)(1). The letters must provide the names, addresses, and titles of the employers, and describe the beneficiary's experiences. *Id.*

In the instant case, the Petitioner submitted a January 19, 2015, letter from a general manager on the stationery of [redacted] in South Korea. The letter states the Beneficiary's

[2] The record establishes the Beneficiary's possession of the foreign equivalent of a U.S. Bachelor's degree.

[3] For labor certification purposes, part-time employment equals one-half the amount of time in full-time experience. *See Matter of Cable Television Labs., Inc.*, 2012-PER-00449, 2014 WL 5478115, *2 (BALCA Oct. 23, 2014) (finding that a foreign national's 16 months of part-time employment amounted to eight months of full-time experience) . Thus, the Beneficiary's four years of claimed part-time experience from September 1, 1989 to August 31, 1993 would equate to two years of full-time employment.

employment by the company as an assistant operations research analyst from January 1, 1998 to June 30, 1999, and as an operations research analyst from July 1, 1999 to December 31, 2007. The letter also states the Beneficiary's employment for 26 hours per week in both positions and describes her duties in the positions.

As noted in the Director's request for evidence (RFE) of February 12, 2015, the letters from do not support the Beneficiary's claimed qualifying experience at stated on the labor certification. and do not appear to be the same employer. The companies have different names, and address on the letter differs from the address of stated on the labor certification. The letter also states the Beneficiary's employment from 1998 to 2007, rather than from 1986 to 1993 as indicated on the labor certification.

In response to the RFE, counsel asserted that a member of his staff mistakenly listed another person's experience on the Beneficiary's labor certification. He stated that the letter from , rather than the information on the labor certification, accurately reflects the Beneficiary's qualifying experience.

In a March 24, 2015, affidavit, the Beneficiary also stated her qualifying experience pursuant to the She stated she was unaware of the error in her employment history on the ETA Form 9089 until after the RFE's issuance. She stated that a member of counsel's staff told her that another person's experience was inadvertently represented as hers on the labor certification. Because she trusted the law firm, the Beneficiary stated that she did not review the form carefully before signing it.

The Petitioner submitted two new letters on stationery, both dated March 16, 2015. The letters, one from the general manager and another from a supervisor, reiterate the information in the company's February 12, 2015, letter. The record also contains business cards of the general manager and the supervisor, and evidence of the letters' mailings from South Korea.

Section K of the accompanying ETA Form 9089 required the Beneficiary to list all of her jobs during the three years preceding the filing of the labor certification application and any other experience qualifying her for the offered position. Under penalty of perjury, the Beneficiary declared that the information on the labor certification regarding her claimed qualifying experience at from 1986 to 1993 was true and correct.

The letter is on the stationery of a company with a different name and address than the Beneficiary's former employer stated on the labor certification. The letter also contains different dates of employment than stated on the labor certification.

The discrepancies between the letter and the labor certification cast doubts on the Beneficiary's claimed qualifying experience for the offered position and the requested classification. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence); *see also Matter of Leung*, 16 I&N Dec. 12 (Distr. Dir.

1976), *disapp'd of on another ground by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (finding the testimony of an employment-based applicant for adjustment of status not credible where he claimed qualifying experience that was not listed on the labor certification for the offered position).

The Petitioner characterizes the discrepancies regarding the Beneficiary's qualifying experience as the result of a harmless, inadvertent error by counsel's staff. However, the discrepancies constitute more than typographical errors or omissions on the ETA Form 9089. The labor certification and letter describe the Beneficiary's qualifying experience at different companies during different time periods. The severity and materiality of the discrepancies require additional independent, objective evidence of the Beneficiary's qualifications for the offered position and the requested classification. *See Ho*, 19 I&N Dec. at 591-92 (stating that "[a]ttempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice").

The Petitioner asserts that its RFE response contains "clear and convincing" evidence of the Beneficiary's qualifying employment by [redacted] from 1998 to 2007. However, the Beneficiary's affidavit has little evidential value because it constitutes biased, rather than objective, evidence of her qualifying experience.

The March 16, 2015, letters on [redacted] stationery are also insufficient because they essentially restate the information in the company's prior letter. Considering the severity and materiality of the discrepancies between the labor certification and the experience letters, the record requires additional independent, objective evidence, such as copies of tax or payroll records, to corroborate the Beneficiary's claimed qualifying experience. The Petitioner has not submitted such evidence or demonstrated its unavailability.

The Petitioner asserts that "there is no rule which dictates or requires that [] only the qualified work experience listed on the Part K of the [labor certification] could be used to document" a beneficiary's qualifications. The Petitioner argues that we would arbitrarily and capriciously deny the petition without citing relevant laws or regulations.

Contrary to the Petitioner's argument, the Act and case law require a petitioner to demonstrate a beneficiary's qualifications stated on an accompanying labor certification. *See* INA § 204(b) (requiring us to investigate and consult with the DOL before determining "if the facts stated in the petition are true"); *Katigbak*, 14 I&N Dec. at 48 (finding that evidence did not support a beneficiary's statement on an accompanying labor certification of her receipt of an "accounting major" in 1970).

The DOL may also determine a beneficiary's qualifications based on information stated on an ETA Form 9089. *See, e.g., Matter of Michelle Guevara Pena, PLLC*, 2007-PER-00116, 2008 WL 2345155, *3 (BALCA June 4, 2008) (affirming a certification denial where an employer failed to indicate a foreign national's necessary work experience on Form ETA 9089). Also, as indicated previously, the ETA Form 9089 instructs a beneficiary to list any experience qualifying her for the

offered position and to declare under penalty of perjury that the information provided is true and accurate. Thus, case law and form instructions indicate that a beneficiary must truthfully state her qualifying experience on a labor certification and that a petitioner must later demonstrate her qualifications as stated on the labor certification.

As previously indicated, we will excuse discrepancies if the record contains independent, objective evidence resolving them. In the instant case, the Petitioner's evidence is not sufficiently reliable to resolve the material discrepancies of record.

The Petitioner further argues that the instant case is distinguishable from *Leung*. In *Leung*, the District Director denied an employment-based, adjustment application in his discretion because the applicant gained the qualifying experience stated on a labor certification for the position while working in the United States without authorization. *Leung*, 16 I&N Dec. at 15. The Petitioner argues that the Beneficiary gained her claimed qualifying experience at [redacted] while working in South Korea legally. The Petitioner also argues that, unlike the record in *Leung*, the instant record contains experience letters from the Beneficiary's purported former employer supporting her claimed qualifying experience.

The lawfulness of the Beneficiary's qualifying experience is irrelevant in these proceedings. *See Matter of O-*, 8 I&N Dec. 295, 296-8 (BIA 1959) (holding that visa petition procedures do not allow a petition's denial based on a finding of inadmissibility). We do not question the Beneficiary's claimed qualifying experience because we believe it was obtained without authorization. Rather, we question her claimed qualifying experience because she did not attest to it as required on the accompanying labor certification. We therefore are not persuaded by this distinction in the Petitioner's case.

The Petitioner correctly states that the record in *Leung* lacked a letter from the applicant's claimed former employer. However, *Leung* does not indicate that such a letter would have changed the District Director's finding.

Moreover, as previously indicated, the discrepancies in the instant record are more serious than the omission of qualifying employment on a labor certification as occurred in *Leung*. The instant record contains specific, affirmative, conflicting statements of the Beneficiary's purported qualifying experience. Because of the severity and materiality of these discrepancies, additional, independent, objective evidence must corroborate the Beneficiary's claimed qualifying experience. *See Ho*, 19 I&N Dec. at 591-92 (stating that "[a]ttempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice").

For the foregoing reasons, the record does not establish the Beneficiary's qualifying experience for the offered position or for the requested classification. We will therefore affirm the Director's decision and dismiss the appeal.

II. THE BONA FIDES OF THE JOB OFFER

The record also does not establish the *bona fides* of the job offer.[4]

A petitioner must intend to employ a beneficiary pursuant to the terms of an accompanying labor certification. *See* INA § 204(a)(1)(F), 8 U.S.C. § 1154(a)(1)(F) (stating that an employer "desiring and intending" to employ a foreign national may file a petition); *Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966) (upholding a petition's denial where a petitioner did not intend to employ a beneficiary pursuant to the terms of an accompanying labor certification).

In the instant case, public records identify the worksite of the job opportunity stated on the accompanying labor certification as a home owned by the Petitioner's president/sole shareholder and his wife. *See* N.J. Free Public Records Directory, at (accessed Oct. 27, 2015).

The residential nature of the worksite casts doubt on the operating status of the Petitioner and its intention to employ the Beneficiary in the offered position. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). In any future filings regarding this matter, the Petitioner must explain how the Beneficiary will perform the duties of the offered position at a home. It must also submit additional evidence of its continuing operations and its intention to employ her pursuant to the terms of the accompanying labor certification.

The record does not establish the Petitioner's intention to employ the Beneficiary in the offered position pursuant to the terms of the accompanying labor certification. We will therefore also dismiss the appeal on this ground.

III. CONCLUSION

The record does not establish the Beneficiary's qualifying experience for the offered position as specified on the accompanying labor certification and as required for classification as an advanced degree professional. The Petitioner claims the experience of another person was inadvertently stated on the labor certification. However, the record does not contain sufficient independent, objective evidence to overcome the doubts cast by the discrepancies of record on the Beneficiary's claimed qualifying experience. We will therefore affirm the Director's decision and dismiss the appeal.

The record also does not establish the *bona fides* of the job offer. We will therefore also dismiss the appeal on this ground.

[4] We may deny a petition on valid grounds unidentified by a director. *See* 5 U.S.C. § 557(b) (stating that, except as limited by notice or rule, a federal agency on review retains all the powers it had in issuing the original decision).

The petition will be denied for the foregoing reasons, with each an individual and alternative basis for denial. A petitioner in visa petition proceedings bears the burden of proving eligibility for the benefit sought. *See* INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of C-F-, Inc.*, ID# 14506 (AAO Nov. 10, 2015)