U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-C-S-, LLC

DATE: DEC. 1, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an environmental services business, seeks to employ the Beneficiary as an environmental scientist. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition, as he found the record did not establish that the Beneficiary had the employment experience required by the labor certification.

The matter is before us on appeal. The Petitioner asserts that the Beneficiary does have the necessary experience and provides new and previously-submitted evidence in support of the visa petition. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor 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). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must 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.

As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by DOL, accompanies the instant petition. By approving the labor certification, DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II) of the Act.

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on the labor certification and the requirements of the requested immigrant

classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

The priority date of a petition is the date that DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d). The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 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 the instant case, the priority date is June 14, 2014. Therefore, the Petitioner must establish that all eligibility requirements for the petition have been satisfied from June 14, 2014, onward.

In the present matter, the primary issue before us is whether the Beneficiary possessed the 24 months of experience required by the labor certification as of the priority date.

II. ANALYSIS

A. Beneficiary's Qualifications

The underlying labor certification states the following requirements for the position of environmental scientist:

H.4.	Education: Master's degree.
H.4-B.	Major field of study: Civil & environmental engineering.
H.5.	Training: None required.
H.6.	Experience in the job offered: Not required.
H.7.	Alternate field of study: None accepted.
H.8.	Alternate combination of education and experience: None accepted.
H.9.	Foreign educational equivalent: None accepted.
H.10.	Experience in an alternate occupation: Accepted.
H.10-A.	No. of months experience in alternate occupation: 24.
H.10-B.	Job title of alternate occupation: Researcher.
H.14.	Specific skills or other requirements: Master's degree in Civil & Environmental Engineering, plus 1 year laboratory and research experience to conduct sampling and onsite testing of contaminated soil, water, oil & air. Familiar with chemicals, hazardous waste and e-waste characters. Familiar with AutoCAD, ArcGIS, auto-sampler, HPLC, GC-MS.

In Part J. of the labor certification, the Beneficiary indicates that she holds a 2010 master's degree in civil and environmental engineering from the [redacted] In Part K. of the labor certification, she claims the following employment experience:

- Environmental scientist, [redacted] full-time from August 30, 2010, to the present (date of labor certification's filing);
- Chemist intern, [redacted] full-time May 31, 2010, to August 13, 2010; and
- Research/teaching assistant, [redacted] part-time (20 hours per week) from August 23, 2008, to August 13, 2010.

To establish the Beneficiary's qualifications for the job opportunity, the Petitioner provided copies of the Beneficiary's resumé; her master's degree in civil engineering from the [redacted] and her academic transcripts; and letters verifying her past employment, which included statements from [redacted] Chair, Department of Civil & Environmental Engineering, [redacted] and [redacted] HR Service Center Representative, the [redacted]

On January 1, 2016, the Director issued a request for evidence (RFE) to the Petitioner, informing it that the evidence of record did not establish that the Beneficiary had the qualifying experience required by the labor certification. The RFE notified the Petitioner of an inconsistency in the end date of the qualifying employment claimed by the Beneficiary with the [redacted] and the absence of any descriptions of the Beneficiary's jobs duties in the submitted experience letters. The Director also advised the Petitioner that the record did not demonstrate that the Beneficiary met all of the special requirements listed in Part H.14. of the labor certification.

On February 26, 2016, the Petitioner responded with additional evidence of the Beneficiary's experience, including new letters from [redacted] and the [redacted] a second copy of the Beneficiary's transcript from the [redacted] a copy of an August 13, 2010, certificate issued to the Beneficiary by the [redacted] for her performance in multi-increment soil preparation; and the [redacted] August 13, 2010, evaluation of the Beneficiary's summer internship. In a February 21, 2016, letter, the Petitioner's President maintained that the requirement that the Beneficiary have 24 months of experience as a researcher could be met by combining the Beneficiary's employment experience with her 2 years of graduate studies.

The Director denied the visa petition on March 8, 2016. Although finding the record to establish the Beneficiary's academic qualifications for the offered position, he concluded that the record did not demonstrate that she also had the employment experience required by the labor certification. The Director found that the qualifying employment experience that the Beneficiary had claimed with the [redacted] and the [redacted] did not provide her with the required 24 months of experience as a researcher, and that the Beneficiary's graduate studies could not be used to supplement her employment experience, as the Petitioner had asserted in response to the RFE.

On March 17, 2016, the Petitioner appealed the Director's decision, asserting that the Director had erred in finding that the Beneficiary did not have the advanced degree or the experience required by the labor certification. In reaching this conclusion, the Petitioner has misunderstood the Director's decision with regard to the Beneficiary's academic qualifications. Our reading of the March 8, 2016, decision finds the Director to have concluded that the Beneficiary's 2010 master's degree in civil engineering from the [redacted] satisfied the labor certification's education requirement. He denied the visa petition because he found that the record did not also establish that the Beneficiary had the required 24 months of experience as a researcher.

On appeal, the Petitioner maintains that it has submitted sufficient documentary evidence to establish the Beneficiary's master's degree in civil engineering and that the Beneficiary has the 12 months of experience required by the offered position. In support of the appeal, the Petitioner submits previously-submitted documentation of the Beneficiary's advanced degree and experience with the [redacted] and the [redacted] and a letter regarding its operations and the resulting need to fill the position of environmental scientist with an applicant who holds the minimum of a master's degree in civil and environmental engineering, has at least 1 year of laboratory and research experience, and can meet the special requirements identified in the labor certification. The Petitioner also provides its print and online job advertisements, as well as its posting notice, for the offered position.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *Madany v. Smith*, 696 F.2d at 1012-13. We must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the labor certification application form. *Id.* at 834.

In the present matter, our reading of the labor certification finds it to require that, as of the June 14, 2014, priority date, the Beneficiary have a U.S. master's degree in civil and environmental engineering (Parts H.4., and H.4-B.) and 24 months of experience as a researcher (Parts H.10, H.10-A., and H.10-B.), which must include 1 year of laboratory and research experience in the sampling and onsite testing of contaminated soil, water, oil, and air (Part H.14.). The labor certification also requires the Beneficiary's familiarity with chemicals, hazardous waste and e-waste characters, as well as with AutoCAD, ArcGIS, auto-sampler, HPLC, and GC-MS (Part H.14.).

In the March 14, 2016, letter that accompanies the appeal, the Petitioner asserts that the Director erred in concluding that the Beneficiary's employment experience does not qualify her for the offered position as there is no requirement that she have 24 months of experience as a researcher. It maintains that the minimum requirements for the offered position are a master's degree and 1 year of

experience. In support of this claim, the Petitioner has submitted its job advertisements and posting notice, which reflect a requirement for 1 year of laboratory and research experience.[1] We note that the letter and Form 9141, Application for Prevailing Wage Determination (Part E.b.4a.), submitted by the Petitioner at the time it filed the visa petition, also state that the job opportunity in this matter requires 1 year of experience.

The Petitioner further asserts that when it answered "Yes" in response to the question in Part H.10. of the labor certification, which asks "Is experience in an alternate occupation acceptable?" and "24" when asked in Part H.10-A. to state the number of months of experience required in the alternate occupation, it was referring to its requirements for the offered position in those instances where a job applicant did not hold an advanced degree. It maintains that as the Beneficiary has a master's degree, only 1 year of experience is required. This alternative reading of the labor certification's requirements is not, however, persuasive.

Although the Petitioner claims that the 24 months of experience required by the labor certification would have applied only to job applicants who applied for the offered position without advanced degrees, we note that it clearly indicated in the labor certification that it would accept only job candidates with master's degrees in civil and environmental engineering, answering "No" to the question in Part H.8., "Is there an alternate combination of education and experience that is acceptable?"[2] Moreover, the job advertisements and posting notice submitted by the Petitioner on appeal clearly require job applicants to have a master's degree in civil and environmental engineering. They offer no indication of the Petitioner's willingness to accept a more experienced candidate with less than a master's degree. The Petitioner's assertions on appeal are also contrary to its prior claim in response to the Director's RFE. At that time, it contended that the Beneficiary had the 24 months of experience required by the labor certification based on a combination of her prior employment and her 2 years of graduate study. Further, the Petitioner submitted a letter to DOL dated December 5, 2014, which asserted that the requirement of a master's degree in civil and environmental engineering was a business necessity. As a result, we do not find the record to support the Petitioner's interpretation of the 24-month experience requirement it placed in Part.H.10-A. of the labor certification.

Here, the terms of the labor certification establish primary requirements of a U.S. master's degree in civil and environmental engineering and 24 months of experience as a researcher, with Part H.14.

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[1] The submitted copies of the newspaper advertisements are illegible.

[2] The instructions to Part H.8. of the ETA Form 9089 state:

> Select Yes or No to indicate if there is an alternate combination of education and experience in the job offered that will be accepted in lieu of the minimum education requirement identified in question 4 of this section. For example, if the requirement is bachelors + 2 years experience but the employer will accept a masters + 1 year experience, an alternate combination of education and experience exists.

https://www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf (last visited Nov. 23, 2016).

requiring that 1 year of that research experience be in the sampling and onsite testing of contaminated soil, water, oil, and air. As the Beneficiary has the required degree, the issue before us in this matter is whether the Beneficiary's employment with the and the provides her with the required 2 years of qualifying employment, one of which has been spent in the onsite testing of contaminated soil, water, oil, and air.

Although the record reflects that the Beneficiary has worked for the Petitioner since August 30, 2010, we note that this experience may not be used to establish her qualifications for the job opportunity. Regulatory requirements at 20 C.F.R. § 656.17 do not allow a beneficiary to qualify for an offered position based on employment experience gained with a petitioner unless that employment is not "substantially comparable"[3] to the job offered. Here, the labor certification reflects that the Beneficiary's employment with the Petitioner has been in the offered position of environmental scientist, and that her duties have been identical to those listed for the offered position (Part H.11.). Therefore, the Beneficiary's experience with the Petitioner is substantially comparable to the offered position and cannot be considered qualifying experience in the present case.

To establish the Beneficiary's qualifying experience, the Petitioner initially submitted a November 2, 2015, statement from Chair, Department of Civil & Environmental Engineering at the who reported that the Beneficiary had worked as a teaching assistant for the department from August 23, 2008, to December 19, 2009, and, thereafter as a research assistant until May 30, 2010. It also provided a July 2, 2014, statement from HR Service Center Representative, the who verified that the Beneficiary had been employed as a summer intern in her company's environmental department from June 1, 2010, until August 13, 2010.

In response to the Director's RFE, the Petitioner supplemented the above evidence with a second statement from dated January 15, 2016, which provided additional information on the research duties performed by the Beneficiary while she served as a teaching assistant. In his statement, also indicated that, although he had previously stated that the Beneficiary's employment as a research assistant had ended on May 30, 2010, the correct date of her departure was August 13, 2010, a result of delays in the completion of the research. statement was accompanied by a lab schedule for one of the two courses for which the Beneficiary served as a teaching assistant, reflecting the experiments to be performed during the fall of

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[3] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> 5) For purposes of this paragraph (i):
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> . . .
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> (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

2008. He also provided descriptions of these two courses, Fluid Mechanics Fundamentals and Environmental Engineering, from the website. The Petitioner also submitted a second letter from the signed by Team Lead, HR Service Center, stating that the Beneficiary was employed on a full-time basis as an environmental intern and providing a description of her research duties.

We do not find the evidence sufficient to establish that the Beneficiary has the experience she has claimed in Part K. of the labor certification.

The labor certification reflects that the Beneficiary was employed on a full-time basis as an intern by the from May 31, 2010, to August 13, 2010, a time period that overlaps with the final months of the part-time (20 hours per week) employment she has claimed with the We note that the Beneficiary's internship with the is supported by letters from the the August 13, 2010, evaluation of the Beneficiary's internship; and the August 13, 2010, certificate she received for soil preparation. The Petitioner has also submitted evidence of the Beneficiary's part-time employment as a teaching/research assistant at the from August 23, 2008, until August 13, 2010, in the form of letters from the chairman of the Beneficiary's department at the However, it has not explained how both of the Beneficiary's claims may be true.

In the absence of any explanation as to how the Beneficiary may have been employed on a full-time basis by the while still working part-time as a research assistant for the we do not find the record to offer a reliable account of the Beneficiary's employment history. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of the evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, even if the above inconsistency were to be resolved, the Beneficiary's claimed employment experience, approximately 2 and ½ months of full-time employment with the and nearly 2 years of part-time employment with the does not equal the 2 years of full-time employment experience required by the labor certification. Therefore, the record does not demonstrate that the Beneficiary has the 24 months of experience as a researcher required by the labor certification.

In that the record does not demonstrate that the Beneficiary has the employment experience required by the labor certification, the Petitioner has not established that she is qualified for the offered position.

B. Ability to Pay the Proffered Wage

Although not addressed by the Director in his decision, we independently note that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward. The proffered wage is $40,685 per year, and the priority date is June 14, 2014. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

> accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

To establish its ability to pay the Beneficiary the proffered wage, the Petitioner submitted copies of its 2014 IRS Form 1120, U.S. Corporation Income Tax Return, and the Beneficiary's 2014 IRS Form W-2, Wage and Tax Statement. These documents establish the Petitioner's ability to pay the proffered wage in 2014. In his January 1, 2016, RFE, the Director asked the Petitioner for evidence of its ability to pay the Beneficiary the proffered wage in 2015. The Petitioner's response to the RFE included a copy of its unaudited 2015 profit and loss statement.

The Petitioner's submission of its 2015 profit and loss statement does not establish its ability to pay in 2015, as no evidence reflects that this statement has been audited, as required by regulation. *See* 8 C.F.R. § 204.5(g)(2). Therefore, in any future proceeding, the Petitioner should provide a copy of its federal tax return, annual report or audited financial statement for 2015, together with any evidence of wages paid to the Beneficiary in 2015. *Id.* The Petitioner should also provide evidence to establish the proffered wage for a second Form I-140 petition filed with USCIS on January 6, 2015, as well as the actual wages, if any, paid to the beneficiary of this second petition.[4]

III. CONCLUSION

The Petitioner has not established that the Beneficiary has the employment experience required by the labor certification. The Petitioner has also not established its continuing ability to pay the proffered wage from the priority date onward. Therefore, the petition may not be approved.

[4] A petitioner must demonstrate its continuing ability to pay the proffered wage of each petition it files. 8 C.F.R. § 204.5(g)(2). Therefore, the instant Petitioner must demonstrate its continuing ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its other petitions that remained pending after the instant petition's priority date. The Petitioner must establish its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until the petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

In visa proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of P-C-S-, LLC*, ID# 41229 (AAO Dec. 1, 2016)