U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-P-, INC.

DATE: APR. 13, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an IT consulting business, seeks to employ the Beneficiary as a business systems analyst. 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 of the Texas Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the Beneficiary met the minimum requirements for the proffered position.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary's employment with the Petitioner qualifies him for the proffered job, and that the Beneficiary has not misstated any of his prior employment.

Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. Employment-Based Immigration

Employment-based immigration generally follows 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). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing 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)(I)-(II) of the Act. Second, the employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may 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.

B. Beneficiary's Qualifications

The Petitioner must establish that the Beneficiary satisfied all of the educational, training, experience, and any other requirements stated on the labor certification by the priority date of September 3, 2013.[1] Part H of the labor certification states that the offered position requires a master's degree in engineering, management, computer science, business administration, or MIS, with 12 months of experience in software development or systems design. The labor certification also allows alternate minimum requirements of a bachelor's degree plus five years of experience.

The record of proceedings contains the Beneficiary's 2008 master's degree in computer science diploma and transcripts from the [redacted] The Beneficiary's master's degree satisfies the educational requirement of the offered position; the issue here is whether the Beneficiary has the 12 months of experience in software development or systems design, as required.

Part K of the labor certification states that the Beneficiary possesses employment experience as a:

- Programmer Analyst with [redacted] Texas, from September 1, 2010, to January 20, 2012; and
- Programmer Analyst with the Petitioner since January 23, 2012.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer/trainer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

The record contains an employment letter dated June 17, 2011, from [redacted] president of [redacted] stating that the Beneficiary was employed full-time as a programmer analyst at a salary of $60,000 per year.[2] However, the letter does not specifically list the Beneficiary's duties as a programmer analyst or his dates of employment. Therefore, the letter does not establish the Beneficiary's 12 months of experience in software development or systems design as required by the labor certification.

The record also contains an August 2015 letter from [redacted] stating that he worked with the Beneficiary during the Beneficiary's employment with [redacted] as a programmer analyst from September 2010 through January 2012. The Petitioner also submitted an August 2010 internship offer letter, offering the Beneficiary work as a "software engineer (intern)." We sent a notice of intent to dismiss and request for evidence (NOID/RFE) to the Petitioner stating that the information provided by [redacted] is inconsistent with the internship offer that [redacted] made to

[1] In cases like this one, the date of a labor certification's filing becomes a petition's "priority date." 8 C.F.R. § 204.5(d). By that date, a beneficiary must meet all the job requirements of an offered position as specified on a labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

[2] The Director noted in his decision that a site visit to [redacted] indicated that no work was being performed there.

the Beneficiary. Specifically, [redacted] indicates that the Beneficiary was employed as a programmer analyst, while the internship offer indicates that the Beneficiary was offered a position as a software engineer (intern). Further, the job duties provided by [redacted] and the internship offer are inconsistent with each other. The internship offer describes the Beneficiary's job duties as:

- Compare and contrast current technology landscape for collaboration software systems such as SharePoint and Microsoft CRM.
- Analyze trends and technological advancements that lead to higher productivity for businesses. This will involve analysis of our development projects and software solutions for our customers.

[redacted] describes the Beneficiary's job duties as:

- Analyzing the requirements of Dynamics CRM based system.
- Developing web applications to extend Microsoft Dynamics CRM 4.0/2011 using Visual C# and ASP.NET.
- Customizing entities, forms, client extensions in Dynamics CRM.
- Developing plugins and custom workflow activities using Visual C# to automate business processes as per the requirements.
- Developing client side scripts using Jscript.
- Data migration using Scribe.
- Developing custom reports using SQL Server Reporting Services.

Moreover, both of these position descriptions differ from the position description on the labor certification, which states that the Beneficiary worked at [redacted] as a programmer analyst with the following duties:

> Develop and write computer software programs to store and retrieve documents, data and information. Consult with and assist computer operators or system analysts to define and resolve problems in running programs using Microsoft Dynamics CRM, Scribe, Resco Mobile, Powershell, Office Extensions & Git.

In addition, the Beneficiary's resume in the record indicates that he was employed as a software engineer intern with [redacted] from September 2010 to January 2011, and thereafter was employed as a programmer analyst at [redacted] through January 2012. His Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status, indicates that his employment with [redacted] from September 1, 2010, to January 17, 2011, was for a credit bearing internship recommended by his academic department.

While the record contains a January 1, 2011, employment contract between [redacted] and the Beneficiary for his services as a programmer analyst at the yearly salary of $60,000, the Beneficiary's 2011 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, reflects that he was paid $21,002.68, much less than the $60,000 yearly salary set forth in the contract. His

paystubs for May to December 2011 confirm that he worked less than 40 hours per week during several of those months. For example, in May 2011, the Beneficiary's pay statement shows he worked only 32 hours that month, and had earned only $8,230.78 year to date at the end of May 2011.[3] The labor certification requires 12 months of experience in software development or systems design, and the Beneficiary's pay statements in the record reflect less than 12 months of full-time experience.

In our NOID/RFE, we asked the Petitioner to resolve the inconsistencies in the record with independent, objective evidence regarding the Beneficiary's experience with *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

In its response to the NOID/RFE, the Petitioner submits an affidavit from the Beneficiary stating that he worked for as a software engineer intern from September 1, 2010, until December 31, 2010. He further states that he continued to work for as a programmer analyst from January 1, 2011, until January 20, 2012. He lists his job duties for both positions and states that in spite of working 40 hours per week in 2011, did not pay him the salary earned. The Petitioner indicated that the Beneficiary had complained prior to his resignation that did not comply with its H-1B wage obligations. However, in response to our NOID/RFE, the Beneficiary indicates that he did not file a complaint because he was afraid he would face a lawsuit from for leaving his contractual term of employment early.

The Beneficiary's affidavit is not independent, objective evidence. It does not explain why the labor certification and letter incorrectly stated his employment with It also does not explain the discrepancies in the Form I-20. The Petitioner has not resolved the inconsistencies and discrepancies with independent, objective evidence regarding the Beneficiary's experience with *See Matter of Ho*, 19 I&N Dec. at 591-92. As such, the Petitioner has not established that the Beneficiary had 12 months of experience in software development or systems design with

The record also contains experience letters from the Petitioner stating that the Beneficiary has been employed as a programmer analyst with the Petitioner since January 2012. The letters and the labor certification reflect the following job duties for this position:

---

[3] The Petitioner also indicated that refused to provide the Beneficiary with his 2012 Form W-2. In response to our NOID/RFE, the Petitioner provided a copy of the IRS Form 4852, Substitute for Form W-2, that the Beneficiary filed with his personal income tax return in 2012. It shows that the Beneficiary received $10,155 in wages from in 2012.

[4] The Director noted in his decision that the Beneficiary misstated the details of his prior work experience on the labor certification. On appeal, the Petitioner states that the Beneficiary "did not misstate the details of his prior work experience" at that the Beneficiary "did work the time as stated in the petition documents;" and that the "pay records do not reflect this only because the employer failed to comply with its [labor condition application] wage attestations."

> Develop and write computer software programs to store and retrieve documents, data and information. Consult with and assist computer operators or system analysts to define and resolve problems in running programs using Microsoft dynamics CRM, Scribe, Resco Mobile, Powershell, Office Extensions & GIT.

The duties of the proffered position of business systems analyst, as described on the labor certification are:

> Analyze data processing problems to design and implement computer systems. Analyze user requirements, procedures, and problems to automate existing systems and review system capabilities.

The Petitioner stated on the labor certification that the Beneficiary did not gain any of his qualifying experience with the Petitioner in a position substantially comparable to the job opportunity requested. In general, experience with a petitioner may be used by a beneficiary to qualify for the proffered position if the position was not substantially comparable.[5] Here, the Director indicated in his decision that the Beneficiary's employment with the Petitioner may have been in a position substantially comparable to the proffered position. The Petitioner asserted that the positions are not substantially comparable because the proffered position's O*NET code is 15-1121 for computer systems analysts and the Beneficiary's experience as a programmer analyst is 15-1131 for computer programmers.[6] The Petitioner submitted an evaluation from [redacted] indicating that the job duties of the offered position of business systems analyst and the Beneficiary's H-1B position of programmer analyst are fundamentally different. He states there is very close to no overlap in job duties at all.

However, the nonimmigrant petitions filed on the Beneficiary's behalf by the Petitioner indicate that the Petitioner requires a programmer analyst to have "a strong background in engineering with computer programming knowledge so as to understand the complex technical resource planning systems in order to analyze, design, integrate, document and convert into software solutions before implementing them." Additionally, the Beneficiary was contracted by the Petitioner to work with [redacted] which describes its need for the Beneficiary's services on Customer Relationship Management and Customer Site Assessment Platform projects including "analyzing requirements and specifications provided by business users and developing software and IT solutions using Microsoft Dynamics CRM 2013 and other related technologies for the Sales and Marketing Department." These duties on behalf of the Petitioner as a programmer analyst appear to directly correspond to the duties listed on the labor certification for the proffered job of business systems analyst, namely: analyzing data processing problems to design and implement computer systems;

---

[5] The regulation at 20 C.F.R. § 656.17(i)(5)(ii) states that a "substantially comparable" job means a job 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.

[6] O*NET is the current occupational classification system used by the DOL.

analyzing user requirements, procedures, and problems to automate existing systems; and reviewing system capabilities. His actual duties on the job as a programmer analyst appear to have been substantially comparable to the duties of business systems analyst.

Accordingly, we advised the Petitioner in our NOID/RFE that if it wished to rely on the Beneficiary's experience with the Petitioner as a programmer analyst, it must provide position descriptions for the jobs of programmer analyst and business systems analyst; the percentage of time spent on the various duties in each position; and organizational charts showing the number of programmer analysts and business systems analysts currently employed by the Petitioner, their annual pay, and their positions in the Petitioner's hierarchy. The Petitioner declined to provide the requested evidence in response to our NOID/RFE. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The Petitioner has not established that the two positions are not substantially comparable and, therefore, the Beneficiary cannot use his experience with the Petitioner to qualify him for the proffered job. Therefore, the Petitioner has not established that the Beneficiary has 12 months of experience in software development or systems design, as required by the labor certification.

C. Ability to Pay the Proffered Wage

The Petitioner must demonstrate that it can pay the proffered wage of $80,000 per year from the priority date of September 3, 2013, until the Beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). In order to establish ability to pay, the petitioner must submit its annual reports, federal tax returns, or audited financial statements for each year from the priority date. *Id.* In our NOID/RFE, we requested the Petitioner to provide one of the three enumerated forms of evidence for 2015; copies of the Beneficiary's 2015 IRS Forms W-2, Wage and Tax Statement, or Forms 1099-MISC, Miscellaneous Income; and copies of his 2016 paychecks. The Petitioner declined to provide the requested financial documents in response to our NOID/RFE.

Further, we stated in the NOID/RFE that according to USCIS records, the Petitioner has filed multiple Forms I-140, Immigrant Petition for Alien Worker, on behalf of other beneficiaries. If a petitioner has filed multiple petitions for multiple beneficiaries, the petitioner must establish that it has the ability to pay the proffered wages to each beneficiary. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977); *Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where the petitioner did not demonstrate its ability to pay combined proffered wages of multiple beneficiaries). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, in our NOID/RFE, we asked the Petitioner to provide additional information for each beneficiary for whom it had filed a Form I-140. The Petitioner declined to provide the requested documents regarding its multiple petitions in response to our NOID/RFE. Therefore, given the lack of required documentation, we find that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

D. Actual Employer

The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under . . . section 203(b)(3) of the Act." In addition, the DOL regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

The Beneficiary's 2014 IRS Form W-2 indicates that he is located in , Florida. However, the job location for the proffered position is in New Jersey. While the labor certification indicates that travel may be required, the Petitioner provides staffing services.[7] Accordingly, we stated in our NOID/RFE that it appears that the Petitioner may intend to place the Beneficiary with another employer rather than directly employ him. We asked the Petitioner to provide evidence to establish that there is a *bona fide* permanent job offer for the Beneficiary; evidence to demonstrate who will control the Beneficiary's employment; and if the Beneficiary will be contracted to perform services to another entity, copies of contracts and invoices specifically naming the Beneficiary and the proffered position. The Petitioner declined to provide the requested evidence in response to our NOID/RFE. The Petitioner has not established that it will be the Beneficiary's actual employer.

II. CONCLUSION

In summary, the Petitioner has not established Beneficiary's possession of the required experience by the petition's priority date. The Petitioner also has not established its continuing ability to pay the proffered wage from the priority date onward, or that it will be the Beneficiary's actual employer.

ORDER: The appeal is dismissed.

Cite as *Matter of E-P-, Inc.*, ID# 8483 (AAO Apr. 13, 2017)

[7] *See,* (last visited Apr. 12, 2017).