



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF S- CORP.

DATE: APR. 26, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a technology company, seeks to employ the Beneficiary as a manager of technology. 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 had not established that the Beneficiary has the required bachelor's degree or the required post-baccalaureate experience for the proffered job.

On appeal, the Petitioner asserts that the Beneficiary meets the requirements for the proffered position.

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

I. LAW

A. Employment-Based Immigration

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).¹ *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the petition.

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

¹ The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d). 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.

immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a 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).

B. The Advanced Degree Classification

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1). An advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i). Further, an “advanced degree” is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive, post-baccalaureate experience in the specialty. *See* 8 C.F.R. § 204.5(k)(2)

A petitioner must also establish a beneficiary’s possession of all the education specified on an accompanying labor certification. *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 160 (Acting Reg’l Comm’r 1977).

II. ANALYSIS

A. The Beneficiary’s Education

In this case, the labor certification states that the proffered position requires a bachelor’s degree in computer science, engineering, business, or a related field, along with 60 months of experience in the job offered or in a computer related field.²

Part J of the labor certification states that the Beneficiary possesses a master of business administration (MBA) degree from [REDACTED] completed in 2008. The record contains a copy of the Beneficiary’s MBA degree and transcripts from [REDACTED] issued in June 2008. The record also contains the following diplomas and transcripts for the Beneficiary:

² Part H.14 of the labor certification also requires a number of specialized skills; however, as the record establishes the Beneficiary’s possession of these skills, we will not elaborate further.

- Post-graduate diploma in software technology issued on March 5, 1997, by the [REDACTED] in [REDACTED] India, together with transcripts;
- Post-graduate diploma in computer applications issued on October 20, 1994, by [REDACTED] in [REDACTED] India, together with two legible marks sheets and an illegible marks sheet; and
- Diploma in industrial electronics issued on August 10, 1992, by the [REDACTED] in India, together with marks sheets.

The Director found that none of the Beneficiary's undergraduate diplomas were equivalent to a U.S. bachelor's degree. The Director further noted in his decision that while the Beneficiary has an MBA as required by the advanced degree classification, the record does not establish that he has a bachelor's degree as required by the terms of the labor certification. However, we disagree. The Petitioner has demonstrated that the Beneficiary exceeds the requirements of the labor certification with a U.S. master's degree in an accepted field, and therefore, the Petitioner has established that the Beneficiary possesses the required education for the offered position. We will withdraw that portion of the Director's decision.

B. The Beneficiary's Experience

As noted, the labor certification requires five years of progressive, post-baccalaureate work experience in the job offered, or five years of progressive, post-baccalaureate work experience in a computer-related occupation.

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

- Full-time manager of technology with the Petitioner in [REDACTED] MA, from March 24, 2008, to the date the labor certification application was filed;
- Full-time Java developer with [REDACTED] in [REDACTED] IL, from November 13, 2007, to March 15, 2008;
- Full-time officer-domain architect with [REDACTED] in [REDACTED] IL; from August 21, 2006, to June 30, 2007; and
- Full-time senior technical architect with [REDACTED] in [REDACTED] CA, from January 17, 2001, to August 18, 2006.³

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer 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.*

³ The Beneficiary is also the beneficiary of an approved Form I-140, Immigrant Petition for Alien Worker, filed by [REDACTED] on December 29, 2005, and approved on April 11, 2006.

The record contains two letters regarding the Beneficiary's experience with [REDACTED]

- A letter from [REDACTED] on [REDACTED] letterhead. The letter does not state her title with the company as required by 8 C.F.R. § 204.5(g)(1). [REDACTED] verifies the Beneficiary's full-time employment with [REDACTED] from January 1, 2001, to December 1, 2001, as a senior technical architect, and from January 1, 2002, to August 21, 2006, as a senior consultant. The letter describes his duties in both positions and specific skills acquired during his employment.
- A letter from [REDACTED] founder of [REDACTED] states that he was the Beneficiary's supervisor at [REDACTED] but is no longer employed there. He verifies the Beneficiary's full-time employment as a senior technical architect from January 17, 2001, to August 18, 2006. The letter describes his duties and specific skills acquired during his employment.

The Director's decision denying the petition stated that the Petitioner has not established that the Beneficiary's experience was obtained after obtaining his bachelor's degree, as the record does not contain any evidence of his receipt of a bachelor's degree. He noted that although the Beneficiary obtained an MBA, the Petitioner had not demonstrated that the Beneficiary received a U.S. bachelor's degree or foreign equivalent degree.

On appeal, the Petitioner states that the Beneficiary gained five years of post-baccalaureate experience as a full-time senior technical architect with [REDACTED] following completion of his studies in India. However, the Petitioner has established that the Beneficiary holds a U.S.-awarded MBA, which we have accepted in lieu of a bachelor's degree. Thus, the Petitioner must establish that the Beneficiary has five years of experience following receipt of his MBA. The Beneficiary's MBA is dated June 15, 2008.⁴ The letters submitted to the record do not establish any experience after June 15, 2008.

Additionally, the letters submitted to the record regarding the Beneficiary's experience with [REDACTED] are inconsistent with each other and with the information provided on the labor certification. The labor certification states that the Beneficiary worked as a full-time senior technical architect with [REDACTED] in [REDACTED] CA, from January 17, 2001, to August 18, 2006. This conflicts with the job titles and dates provided by [REDACTED] who verified the Beneficiary's full-time employment with [REDACTED] from January 1, 2001, to December 1, 2001, as a senior technical architect, and from January 1, 2002, to August 21, 2006, as

⁴ The Petitioner states on appeal that the Beneficiary's admission into the MBA program at the [REDACTED] "serves as evidence of the foreign equivalent of a bachelor's degree earned by the Beneficiary as of 2005." Even if we accepted this assertion and credited the Beneficiary with a bachelor's degree as of September 2005, when he began his MBA program, the Beneficiary's experience prior to September 2005 would not count as post-baccalaureate experience and he would not have established five years of post-baccalaureate experience with [REDACTED] after September 2005.

a senior consultant. [REDACTED] letter also conflicts with the job title and dates provided by [REDACTED] who described the Beneficiary's employment with [REDACTED] as a senior technical architect from January 17, 2001, to August 18, 2006. The Petitioner must resolve these discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The submitted experience letters do not establish that the Beneficiary possessed five years of experience following receipt of his MBA. Thus, the Petitioner has not established that the Beneficiary possesses the required experience for the offered position.

C. The Petitioner's Ability to Pay the Proffered Wage

Although not addressed by the Director, we independently note that, even if the Petitioner had established that the Beneficiary possessed the required education and experience for the proffered job, the Petitioner did not establish its continuing ability to pay the proffered wage.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The record contains the following evidence regarding the Petitioner's ability to pay the annual proffered wage of \$142,161 as of the November 30, 2015, priority date:

- IRS Forms W-2, Wage and Tax Statements, establishing that the Petitioner paid the Beneficiary \$237,921.50 in wages in 2015;⁵
- An undated letter from [REDACTED] Director of Finance, [REDACTED] stating that the Petitioner has been in business since 1990; maintains current assets totaling \$550 million, including \$109 million in cash and cash equivalents; that it has a worldwide workforce of over 12,000 employees; and that its average gross revenue over the past two years is over \$700 million. It further states that as a February 2015, the Petitioner is a wholly-owned

⁵ Although the Petitioner established that it paid the Beneficiary more than the proffered wage in 2015, it must still provide regulatory-prescribed evidence of its ability to pay the proffered wage. See 8 C.F.R. § 204.5(g)(2).

subsidiary of [REDACTED] The letter does not name the Beneficiary and, because it is undated, it is unclear which years' financial results the letter refers to; and

- A letter dated June 6, 2016, from [REDACTED] Senior Manager, [REDACTED] on [REDACTED] letterhead, stating that the Petitioner has the ability to pay the proffered wage. The letter indicates that supporting financial documentation is attached, but no financial documentation relating to the Petitioner was attached to the letter or otherwise enclosed in the file. The letter does not indicate the Petitioner's number of employees or its financial results, and it does not indicate that it is from a financial officer of the corporation.

On the labor certification, the Petitioner indicated that it had 12,000 employees. However, on the petition, the Petitioner indicated that it had 2357 employees, "\$10+ bill. (parent)" in gross annual income, and "901 mill. Euro (parent)" in net annual income.⁶ Given the inconsistencies in the documentation regarding the Petitioner's number of employees and financial results, the noted deficiencies in the letters, and the Petitioner's purchase by [REDACTED] in 2015, we decline to accept the letters from the Petitioner as evidence of the Petitioner's ability to pay the proffered wage.

As we decline to rely on the letters in the record, we will examine the other financial documentation submitted. Although the record establishes that the Petitioner paid the Beneficiary more than the proffered wage in 2015, the record does not any contain annual reports, federal tax returns, or audited financial statements for the Petitioner. *See* 8 C.F.R. § 204.5(g)(2). Accordingly, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

III. CONCLUSION

The Petitioner has not established that the Beneficiary possessed the experience required by the terms of the labor certification. The Petitioner has also not established its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of S- Corp.*, ID# 329524 (AAO Apr. 26, 2017)

⁶ Because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."