



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

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

MATTER OF C-S- CO.

DATE: AUG. 10, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of information technology consulting services, seeks to employ the Beneficiary as a senior systems administrator. It requests his classification as a member of the professions holding an advanced degree under the second-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows U.S. businesses to sponsor foreign nationals for lawful permanent resident status if they have master’s degrees, or bachelor’s degrees followed by five years of experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the record did not establish the Beneficiary’s possession of the minimum education required for the offered position and the requested classification.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in measuring the Beneficiary’s possession of the required bachelor’s degree from the date of his diploma, rather than from the date he passed the degree’s final examination.

Upon *de novo* review, we will withdraw the Director’s decision and remand this matter for further consideration consistent with the following opinion.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer files a labor certification application with 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). DOL must certify that the United States lacks able, willing, qualified, and available workers for an offered position, and that employment of a foreign national will not hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If DOL certifies an offered position, the employer must then file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. In petition proceedings, USCIS determines, among other things, whether a beneficiary meets the DOL-certified requirements of an offered position. Finally, if USCIS approves a 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.

An advanced degree professional must have at least a master's degree, or a bachelor's degree followed by five years of progressively responsible experience in the specialty. 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree"). In addition, like all beneficiaries, an advanced degree professional must establish his or her possession of all DOL-certified requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).¹

II. ANALYSIS

A. The Beneficiary's Possession of the Minimum Educational Requirements

Here, the labor certification states the minimum requirements of the offered position of senior systems administrator as a master's degree in computer science, engineering, or a related field, plus one year of experience in the job offered or as a web developer, assistant systems engineer, senior software engineer, or a related occupation. In the alternative, the labor certification also states the Petitioner's acceptance of a bachelor's degree followed by five years of experience.

The Petitioner asserts the Beneficiary is qualified for the offered position and the requested classification based on his possession of a bachelor's degree followed by five years of experience. The Beneficiary attested that he attained a bachelor's degree in computer science and engineering from an Indian university in 2006.

The Petitioner submitted a copy of a "provisional certificate" from the university. Dated March 22, 2010, the certificate states the Beneficiary's passage of a final examination for a bachelor of technology degree in computer science and engineering in November 2006. The certificate states that the Beneficiary "has satisfied all the requirements for the award of the B.Tech. Degree."

The Petitioner also submitted a consolidated memorandum of marks from the university, indicating the Beneficiary's completion of four years of studies before passing the final exam. In addition, the Petitioner provided an independent evaluation of the Beneficiary's foreign degree, finding it equivalent to a U.S. bachelor of science degree in computer science.

In response to the Director's request for additional evidence (RFE), the Petitioner provided a copy of the Beneficiary's degree diploma, which the university did not issue until January 19, 2017. Because the Beneficiary received the diploma after November 6, 2015, the Director concluded that the Beneficiary lacked a bachelor's degree by the petition's priority date as required for the offered position and the requested classification.

¹ The priority date of this petition is November 6, 2015, the date the DOL accepted the labor application for processing. See 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

While this appeal was pending, we decided a similar case that USCIS adopted as agency policy. See *Matter of O-A-, Inc.*, ID# 84300 (AAO Mar. 15, 2017). In *O-A-*, we held that a provisional certificate may establish a beneficiary's possession of a required degree if the record demonstrates the satisfaction of all substantive degree requirements and the issuing school's approval of the degree. *Id.* at *3.

Like the petitioner in *O-A-*, the Petitioner here submitted copies of a provisional certificate and a marks statement from an Indian university. The materials indicate the Beneficiary's completion of all substantive degree requirements and the issuing university's approval of the degree by the petition's priority date. Thus, the record establishes the Beneficiary's possession of the required degree as of March 22, 2010, the date of the provisional certificate.

Contrary to the Director's decision, the record establishes the Beneficiary's attainment of the minimum educational requirements of the offered position and the requested classification by the petition's priority date. We will therefore withdraw the decision.

B. The Beneficiary's Possession of the Minimum Experience Requirements

Although the Beneficiary meets the educational qualifications of the offered position and the requested classification, the petition is not approvable. The record does not establish the Beneficiary's possession, by the petition's priority date, of the minimum experience required for the offered position.

As previously indicated, to qualify for the offered position, the Beneficiary must have at least five years of post-baccalaureate experience by the petition's priority date. Thus, the Petitioner must establish the Beneficiary's possession of at least five years of qualifying experience from the issuance of his provisional certificate on March 22, 2010, until the petition's priority date of November 6, 2015.

For almost that entire five-year, seven-month period, the Beneficiary attested that he gained full-time, qualifying experience. He stated that a consulting company in India employed him as an assistant systems engineer for about four years, seven months. He stated that the Petitioner employed him thereafter in the United States as a web developer for about a year.

A labor certification employer generally cannot rely on experience that a foreign national gained with it, unless the experience was in a substantially different position or the employer can demonstrate the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). A substantially different position requires performance of the same job duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

Here, the Petitioner provided a letter from its president describing the Beneficiary's duties and indicating that he gained experience with the company in a substantially different position. The record therefore establishes the Beneficiary's possession of about 11 months of qualifying

experience with the Petitioner. See 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to support a beneficiary's claimed, qualifying experience with letters from current or former employers).

A letter from the Beneficiary's former employer in India, however, does not establish the remainder of his claimed, qualifying experience. Contrary to 8 C.F.R. § 204.5(g)(1), the letter does not describe the Beneficiary's experience. Rather, the letter merely offers him a position, without confirming his acceptance of the offer or his actual performance of job duties.

The Petitioner also submitted a "final settlement" from the Beneficiary's former employer. This document lists the Beneficiary's earnings at the company and confirms his employment over the four year, seven month period. Like the company's offer letter, however, the final settlement does not describe the Beneficiary's experience. Therefore, the settlement document also does not establish the Beneficiary's qualifying experience.

The Petitioner submitted affidavits from five purported, former co-workers of the Beneficiary, describing his duties with the former employer in India. These documents, however, are not "from . . . [the] former employer" as 8 C.F.R. § 204.5(g)(1) requires. Before USCIS can consider evidence of the Beneficiary's qualifying experience from other sources, the Petitioner must demonstrate the unavailability of a letter from his former employer. See 8 C.F.R. § 103.2(b)(2)(i) (requiring a petitioner to demonstrate the unavailability of a required document).

In response to the RFE, counsel asserted that the Beneficiary's former employer does not issue employment letters in compliance with USCIS regulations. Assertions of counsel, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The Petitioner must substantiate counsel's statement with independent evidence, which may include affidavits or declarations.

In addition, even if USCIS could consider the affidavits from the Beneficiary's purported, former co-workers, they do not explain how the affiants gained personal knowledge of the Beneficiary's former job duties. The record also lacks independent evidence that the affiants worked for the Beneficiary's former employer during the relevant period. The affidavits therefore are not reliable evidence of the Beneficiary's claimed, qualifying experience.

The Petitioner also submitted a letter from another former employer of the Beneficiary. His experience with this employer, however, predates the March 22, 2010, issuance of his provisional certificate. This letter therefore does not establish the Beneficiary's post-baccalaureate experience.

For the foregoing reasons, the record does not establish the Beneficiary's possession of at least five years of post-baccalaureate experience by the petition's priority date as required for the offered position. Because the Director's decision did not address this issue, we will remand the matter for further consideration.

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

Also unaddressed by the Director, the record does not establish the Petitioner's ability to pay the proffered wage.

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Here, USCIS records indicate the Petitioner's filing of at least 11 other petitions that remained pending or approved after this petition's priority date.²

Because a petitioner must demonstrate its ability to pay until a beneficiary obtains lawful permanent residence, the Petitioner here must demonstrate its ability to pay the combined proffered wages of this petition and the other petitions that simultaneously remained pending or approved. The Petitioner must demonstrate its ability to pay the combined proffered wages from this petition's priority date of November 6, 2015, until the other beneficiaries obtained lawful permanent residence or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming a revocation where a petitioner, as of the petition's approval, did not demonstrate its ability to pay combined proffered wages of multiple, pending petitions).

The record does not document the proffered wages of the other pending petitions, or whether the Petitioner paid wages to any of their beneficiaries. The record also did not indicate whether any of the other petitions were denied, withdrawn, or revoked, or whether any of their beneficiaries obtained lawful permanent residence. The record therefore does not establish the Petitioner's ability to pay the proffered wage.

On remand, the Director should notify the Petitioner of the evidentiary deficiencies regarding the Beneficiary's experience and the Petitioner's ability to pay. The Director may also notify the Petitioner of other deficiencies he may notice.

The Director should afford the Petitioner a reasonable opportunity to respond to the notice. The Petitioner may submit additional evidence of its ability to pay, including evidence of factors discussed in *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

The record establishes the Beneficiary's possession, by the petition's priority date, of the minimum education required for the offered position and the requested classification. The record, however,

² USCIS records identify the other petitions by the following receipt numbers:

[REDACTED]
[REDACTED] and [REDACTED]

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does not establish the Beneficiary's possession of the minimum experience required for the offered position or the Petitioner's ability to pay the proffered wage.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of C-S- Co.*, ID# 594089 (AAO Aug. 10, 2017)