U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-T- INC.

DATE: JAN. 30, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of software development and information technology consulting services, seeks to employ the Beneficiary as a programmer analyst. It requests classification of the Beneficiary as a professional holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This category allows a U.S. business to sponsor a professional with an advanced degree or its equivalent for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition, concluding that the offered position does not require the services of an advanced degree professional. The Director also noted that the record: 1) contained inconsistencies regarding the Beneficiary's experience; 2) did not establish the Beneficiary's possession of the education required for the job offered and the requested classification; and 3) did not establish the Petitioner's ability to pay the Beneficiary the proffered wage.

The matter is now before us on appeal. The Petitioner asserts that the proffered position requires an advanced degree professional and contends that the Director erroneously found that the Petitioner lacks the ability to pay the proffered wage. The Petitioner also asserts that, before denying the petition, the Director should have sent a request for evidence (RFE) to allow the Petitioner to clarify the position's requirements and to overcome purported discrepancies of record.

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

I. LAW

Employment-based immigration is generally a three-step process. First, a U.S. employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (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, the U.S. employer must file a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves the immigrant visa petition, a 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.

By approving the labor certification in this case, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of programmer analyst. *See* 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. *See* section 212(a)(5)(A)(i)(II).

In visa petition proceedings, USCIS must determine whether the Beneficiary meets the requirements of the offered position certified by the DOL. USCIS must also determine whether the Petitioner and the Beneficiary qualify for the requested immigrant classification. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service "makes its own determination of the alien's entitlement to [the requested] preference status").

II. ANALYSIS

A. The Requirements of the Offered Position

The Act makes visas available to qualified immigrants who are "members of the professions holding advanced degrees or their equivalent." Section 203(b)(2)(A) of the Act. A labor certification accompanying a petition for an advanced degree professional "must demonstrate that the job requires a professional holding an advanced degree or the equivalent." 8 C.F.R. § 204.5(k)(4)(i). The term "advanced degree" means "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2).

In this case, the labor certification states the minimum requirements of the offered position of programmer analyst as a U.S. bachelor's degree or a foreign equivalent degree in computer science, electrical engineering, or a closely related field, plus 60 months of experience in the job offered or as a software engineer or related occupation. The labor certification also states that the Petitioner will accept an alternate combination of education and experience in the form of a "3-year foreign equivalent degree" and 5 years of experience. In addition, Part H.14 of the labor certification states: "Any suitable combination of education (including 3-year foreign degree equivalent), training, or experience is accepted."

In assessing a job's requirements, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

Based on the alternate requirements and the language in Part H.14 of the labor certification, the Director concluded that the offered position does not require an advanced degree or its equivalent. In doing so, the Director implicitly found that the Petitioner would accept a 3-year foreign degree

that does not equate to a U.S. bachelor's degree, or that a 3-year foreign degree can never equate to a U.S. bachelor's degree. Either way, we do not agree with the Director's findings.

The plain language of the labor certification indicates that the Petitioner will not accept a 3-year foreign degree unless it equates to a U.S. bachelor's degree. Both Parts H.8 and H.14 of the labor certification state that the Petitioner will accept a "3-year foreign equivalent degree." The use of the modifier "equivalent" in the requirement indicates that an acceptable, 3-year foreign degree must equate to a U.S. bachelor's degree. *See SnapNames.com, Inc. v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005, *7 (D. Or. Nov. 30, 2006) (quoting *Rosedale & Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)) (holding that USCIS must "examine the certified job offer exactly as it is completed by the prospective employer"). Thus, the labor certification indicates that the Petitioner will not accept any 3-year foreign degree, but only one that equates to a U.S. baccalaureate degree.

We also do not agree with the finding that a 3-year foreign degree can never equate to a U.S. bachelor's degree. In our experience, there are some 3-year foreign bachelor's degrees that may be deemed equivalent to a U.S. bachelor's degree. For example, bachelor's degrees in the United Kingdom generally reflect 3 years of university studies. But, because U.K. university students typically complete a year or more of pre-university preparatory courses and examinations, we routinely find 3-year, U.K. bachelor's degrees equivalent to U.S. bachelor's degrees.

Therefore, we find that, by stating that the Petitioner will accept a "3-year foreign equivalent degree" and 5 years of experience, the labor certification required the equivalent of an advanced degree. We will withdraw the Director's contrary decision.

B. The Beneficiary's Education

Although the Director erred in concluding that the offered position did not require an advanced degree professional, the petition is not approvable. As the Director noted, the record does not establish the Beneficiary's possession of the educational requirements for the offered position and the requested classification.

A petitioner for an advanced degree professional must establish a beneficiary's possession of a U.S. advanced degree or a foreign equivalent degree, or a U.S. bachelor's degree or a foreign equivalent degree followed by 5 years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(3)(i). A petitioner must also 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).

As previously indicated, the labor certification states the minimum requirements of the offered position of programmer analyst as a U.S. bachelor's degree or a foreign equivalent degree in computer science, electrical engineering, or a closely related field, plus 60 months, or 5 years, of

experience in the job offered or as a software engineer or related occupation. The labor certification also states that the Petitioner will accept an alternate combination of education and experience in the form of a "3-year foreign equivalent degree" and 5 years of experience.

At issue is: 1) whether the Beneficiary has a foreign equivalent degree, including a 3-year bachelor's degree, that equates to a U.S. bachelor's degree as required by the labor certification; and 2) whether the Beneficiary has a single U.S. bachelor's degree or foreign equivalent degree required for classification as an advanced degree professional.

The Beneficiary attested on the labor certification to his possession of a bachelor's degree in computer science from [redacted] in India. The Petitioner submitted a copy of a bachelor of science diploma from the university indicating the Beneficiary's completion of the degree in 1993. A copy of a provisional certificate and consolidated marks memorandum indicate that the Beneficiary studied 3 years at the university to obtain the degree. The Petitioner also submitted a copy of a certificate from [redacted] in India, stating the Beneficiary's receipt of a post-graduate diploma (PGD) from this organization the year after his university graduation.

In addition, the record contains an evaluation of the Beneficiary's foreign educational credentials. The evaluation states that the Beneficiary's Indian bachelor's degree "satisfied similar requirements to the completion of three years of academic study towards a Bachelor of Science Degree from an accredited institution of tertiary education in the United States." The evaluation states that the Beneficiary possesses the equivalent of a U.S. bachelor's degree based on his PGD from [redacted] "considered together with his prior studies at [redacted]."

Pursuant to the alternate educational requirement on the labor certification, the Petitioner asserts the Beneficiary's possession of a "3-year foreign equivalent degree." But, contrary to the Petitioner's assertion, the evaluation does not conclude that the Beneficiary's 3-year foreign degree equates to a U.S. bachelor's degree. The record therefore does not establish the Beneficiary's possession of the alternate educational requirements stated on the labor certification.

On appeal, the Petitioner also attempts to qualify the Beneficiary for the job offered on the basis that his PGD following a 3-year bachelor's degree equates to a U.S. bachelor's degree. As noted, the educational evaluation submitted by the Petitioner asserted the Beneficiary's possession of the equivalent of a U.S. bachelor's degree based on his PGD considered with his bachelor's degree. However, the evaluation did not examine the entrance requirement of the PGD program or indicate that the program required prior undergraduate education, much less a 3-year bachelor's degree for admission. USCIS uses a foreign education evaluation only as an advisory opinion. If an evaluation conflicts with prior equivalencies or is questionable in any way, we may discount it or give it less evidentiary weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988).

Moreover, the evaluation also did not address whether [redacted] is a college or university. A petition based on the equivalent of an advanced degree must be accompanied by "[a]n official academic record showing that the beneficiary has a United States baccalaureate degree or a

foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(B). For this purpose, a "baccalaureate means a bachelor's degree received from a college or university, or an equivalent degree." Final Rule for Employment-Based Immigrant Visa Petitions, 56 Fed. Reg. 30703, 30706 (July 5, 1991). Here, the record does not establish the issuance of the Beneficiary's post-graduate diploma by a college or university.

As such, the evidence of record does not establish either the Beneficiary's 3-year bachelor's degree or his PGD as the foreign degree equivalent of a U.S. bachelor's degree from a college or university. Therefore, the Beneficiary does not have the education required by the terms of the labor certification.

Also, the Act and its legislative history indicate that an advanced degree professional must possess a bachelor's degree without combining lesser educational credentials and without combining education with experience. In response to complaints that the immigrant visa regulations barred the substitution of experience for education, the former Immigration and Naturalization Service (INS) reviewed the Immigration Act of 1990. The INS found that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor's degree." 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991); *see also SnapNames.com*, 2006 WL 3491005 at **10-11 (holding that, because the determination depends on the agency's interpretation of its statute and regulations, USCIS properly concludes that classification as a professional or an advanced degree professional requires a single equivalent degree). As noted above, the Petitioner has not established that the Beneficiary has the single U.S. bachelor's degree or foreign equivalent degree required for the advanced degree professional classification.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the education required for the offered position or the requested classification. We will therefore dismiss the appeal.

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

As the Director noted, the record also 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). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In this case, the labor certification states the proffered wage of the offered position of programmer analyst as $97,157 per year. The petition's priority date is June 1, 2015. This is the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d)(explaining how to determine a petition's priority date).

The record contains a copy of the Petitioner's federal income tax return for 2014. But the record lacks required evidence of the Petitioner's ability to pay the proffered wage in 2015, the year of the

petition's priority date. Although the Director's decision addressed the lack of evidence from the petition's priority date onward, the Petitioner did not submit any additional evidence of its ability to pay the proffered wage on appeal. Because of the absence of required evidence from the petition's priority date onward, the record does not establish the Petitioner's ability to pay.

We may also consider the totality of a petitioner's circumstances when analyzing its ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). Pursuant to *Sonegawa*, we may consider other factors such as: the number of years a petitioner has conducted business; its number of employees; the growth of its business; its reputation in its industry; the occurrence of uncharacteristic business losses or expenses; a beneficiary's replacement of a current employer or outsourced service; or other evidence of a petitioner's ability to pay. However, the absence of financial information from the petition's priority date onward precludes us from analyzing the totality of the Petitioner's circumstances.

For the foregoing reasons, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

D. Due Process

On appeal, the Petitioner asserts that USCIS violated its due process rights by denying the petition without first notifying it of the petition's alleged defects and affording it an opportunity to respond. Citing an internal USCIS memorandum, the Petitioner states that USCIS should have issued an RFE or notice of intent to deny (NOID) before denying the petition. *See* memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 70/2, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)* 2 (Feb. 16, 2005).

As stated in the internal memo, absent "clear evidence of ineligibility," USCIS should not deny a petition without first issuing an RFE or NOID. *Id* at 2. As previously discussed, the Director erred in concluding that the offered position of programmer analyst did not require an advanced degree professional. The record in this case therefore did not contain clear evidence of ineligibility. However, even if the Director committed a procedural error by not soliciting further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The Director's decision notified the Petitioner of defects in the petition regarding the Beneficiary's qualifications and the Petitioner's ability to pay the proffered wage. On appeal, the Petitioner submitted additional evidence addressing the defects. *See* USCIS, Instructions to Form I-290B, Notice of Appeal or Motion, 2 at https://www.uscis.gov/sites/ default/files/files/form/i-290binstr.pdf (accessed Jan. 27, 2017) (allowing the submission of additional evidence on appeal); *see also* 8 C.F.R. 103.2(a)(1) (incorporating form instructions into the regulations). Thus, despite the petition's denial without prior issuance of an RFE or NOID, the record indicates the Petitioner's receipt of notice of the petition's defects and an opportunity to respond to them on appeal.

III. CONCLUSION

The record establishes that the offered position requires an advanced degree professional. We will therefore withdraw the Director's contrary decision. But the record does not establish the Beneficiary's possession of the educational credentials required for the offered position and the requested classification. The record also does not establish the Petitioner's ability to pay the proffered wage.

The petition will remain denied for the reasons stated above, with each considered an independent and alternate ground of denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-T- Inc.*, ID# 96485 (AAO Jan. 30, 2017)