U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Q-H-, INC.

DATE: MAR. 22, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a healthcare IT software company, seeks to employ the Beneficiary as a vice president of product innovation. 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, Texas Service Center, denied the petition, concluding that the Petitioner had not established that the Beneficiary met the minimum experience requirements of the labor certification.

The matter is now before us on appeal. The Petitioner asserts on appeal that the Beneficiary meets the minimum experience requirements of the labor certification. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

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). *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. By approving the labor certification, the 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.

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.

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).

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. *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). The priority date in this case is August 17, 2015.

B. Beneficiary Qualifications

In this case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in business administration.
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 84 months in healthcare product innovation, consulting, product development and business strategy.
H.14. Specific skills or other requirements: Consulting, product development and business strategy. Two years of experience in design and development and relate technology process of business intelligence and machine learning and predictive clinical analytics tools. Must have three years leading cross functional teams in start-up environment to perform development, commercialization and pilot launches of healthcare analytics products. Must have two years of experience preparing and delivering complex written and verbal materials. Must have two years of experience managing resource requirements and project workflows. Detailing knowledge of current market, financial and technology trends and outlook pertaining to hospitals and other healthcare providers, electronic health workers, clinical data, clinical workflows, and healthcare reimbursement. Detailed knowledge of current competitors, competing products, investors, and strategic partners in the healthcare technology, healthcare analytics, and electronic health records.

The labor certification also states that the Beneficiary possesses a master's degree in business administration from [redacted] completed in 2012,[1] and experience as follows:

- Full-time vice president of product innovation with the Petitioner from October 16, 2014, to the date the labor certification was signed;[2]
- Full-time manager, healthcare innovation, with [redacted] from February 4, 2013, to October 15, 2014;
- Full-time physician intern with [redacted] from July 1, 2010, to June 30, 2011;
- Full-time chief technology officer with [redacted] from July 1, 2008, to June 30, 2011 (noted part-time from July 1, 2010, to July 30, 2011);
- Full-time founder and CEO of [redacted] from January 1, 2006, to January 1, 2011;
- Part-time team leader R&D with [redacted] from May 1, 2005, to June 30, 2006 (30 hours per week); and
- Part-time information systems manager with [redacted] from May 1, 2002, to July 30, 2004 (30 hours per week).

The Beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the Beneficiary's experience. 8 C.F.R. § 204.5(g)(1).

The record contains the following experience letters:

- Letter from [redacted] indicating that the Beneficiary was employed full-time as a senior associate intern from June 11, 2012, to August 16, 2012, and as a manager, healthcare innovation strategy and healthcare incubation lab, from February 4, 2013, to October 15, 2014;
- Letter from [redacted] stating that the Beneficiary was employed full-time as a physician intern from July 1, 2010, to June 30, 2011;
- Letter from [redacted] indicating that the Beneficiary was employed full-time as a chief technology officer from July 1, 2008, to June 30, 2010, and part-time from July 1, 2010, to July 30, 2011;
- Letter from [redacted] stating that the Beneficiary was employed as a subcontractor working "varying hours per week" from October 2007, to May 2011;
- Letter from [redacted] stating that the Beneficiary was employed part-time (30 hours per week) as a team leader from May 1, 2005, to June 30, 2006; and

[1] The record contains the Beneficiary's degree and transcripts from [redacted] indicating that he has the required education for the proffered job.

[2] If the Beneficiary is employed by the Petitioner, the Petitioner cannot require U.S. applicants to possess training and/or experience beyond what the Beneficiary possessed at the time of initial hire by the Petitioner: (1) unless the Beneficiary gained the experience while working for the Petitioner in a position not substantially comparable to the position for which certification is sought; or (2) the Petitioner can demonstrate that it is no longer feasible to train a worker to qualify for the position. 20 C.F.R. § 656.17(i)(3). A substantially comparable position means a job or position requiring performance of the same duties more than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

- Letter from [redacted] stating that the Beneficiary was employed part-time (30 hours per week) as an information systems engineer from May 1, 2002, to July 30, 2004.

In a request for evidence dated March 30, 2016, the Director noted several inconsistencies in the record regarding the Beneficiary's employment history, specifically regarding overlapping experience with [redacted] and [redacted] and that the jobs with [redacted] and [redacted] do not meet the requirements of Part H.10-B of the labor certification (requiring 84 months of experience in healthcare product innovation, consulting, product development and business strategy). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In response to the RFE, the Petitioner submitted a statement from the Petitioner; an affidavit from the Beneficiary; Appendix A to the Beneficiary's tax returns for 2009 and 2010; eight invoices billed to various clients by the Beneficiary in 2009 and 2010; a copy of DOL guidance from 1981;[3] and previously submitted evidence.

In his decision, the Director noted additional inconsistencies in the record regarding the Beneficiary's employment history. Specifically, he noted that although the record indicates that the Beneficiary worked for [redacted] as a subcontractor through his own company, [redacted] from October 2007 to May 2011; the Beneficiary indicated on the labor certification that he operated [redacted] from January 1, 2006, to January 1, 2011. Therefore, the Director stated that the record is not clear as to how the Beneficiary worked as a subcontractor with Interbit from January 2, 2011, to May 2011. The Director also noted that the record regarding the Beneficiary's part-time employment was not fully documented to establish his qualifications for the proffered job.

On appeal, the Petitioner submits a brief and states that the record establishes that the Beneficiary has 92 months of qualifying "combined full and part-time qualifying experience" *not including* the experience with [redacted] and [redacted] The Petitioner also submits a new affidavit from the Beneficiary on appeal,[4] together with previously submitted evidence of the Beneficiary's experience. We will address each employer below.

[3] The Petitioner submitted an excerpt from Technical Assistance Guide (TAG) No. 656, Labor Certifications, issued by the DOL in 1981. It states that "part-time employment may be considered in computing a full year's employment," and that "two year's experience working four hours per working day equals one full year of full-time employment." The excerpt also contains part of a former DOL regulation, 20 C.F.R. § 656.21(a)(3), which stated that "two year's experience working half-days is the equivalent of one year's full-time experience." The DOL's TAG is not binding precedent in this matter. However, we do credit part-time employment as described in the TAG.

[4] The Beneficiary's affidavit does not provide independent, objective evidence of his prior work experience. *See Matter of Ho*, 19 I&N Dec. at 591-592.

1. The Petitioner

The Beneficiary indicated in response to question K.1. on the labor certification that his position with the Petitioner was as a vice president of product innovation, and the job duties are the same duties as the position offered. Therefore, the experience gained with the Petitioner was in the position offered and is substantially comparable, as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the Petitioner cannot rely on this experience for the Beneficiary to qualify for the proffered position.

2.

The record establishes the Beneficiary's 20 months and 11 days of qualifying full-time employment with (from February 4, 2013, to October 15, 2014).

3.

The record establishes the Beneficiary's 11 months and 29 days of qualifying full-time employment with (from July 1, 2010, to June 30, 2011).[5]

4.

The record establishes the Beneficiary's 23 months and 29 days of qualifying full-time employment with (from July 1, 2008, to June 30, 2010).

5.

The record does not establish the Beneficiary's full-time or part-time employment from July 1, 2006, to June 30, 2008 (the time period not covered by his other periods of employment).[6] While the letter from states that the Beneficiary was employed as a subcontractor working varying hours per week from October 2007 to May 2011, it does not specifically indicate how many hours each week the Beneficiary worked. Therefore, we cannot calculate the total full-time equivalent hours that he worked during that timeframe. Further, the Petitioner has provided no additional independent, objective evidence of his self-employment during that timeframe. *See Matter of Ho*, 19 I&N Dec. at 591-592.

[5] We note that the Beneficiary attended school from the fall of 2011 through the fall of 2012, which accounts for the gap in employment.

[6] The labor certification indicates that he worked full-time at from January 1, 2006, to January 1, 2011. The timeframe from July 1, 2008, onward has already been credited to his employment with and

6.

The record establishes the Beneficiary's 13 months and 29 days of part-time experience with (from May 1, 2005, to June 30, 2006). He worked 30 hours per week during that timeframe. While he will not be credited for full-time experience, he will be credited for the full-time equivalent of his part-time experience, which is approximately 12 months.[7]

7.

The labor certification indicates that the Beneficiary worked as a part-time information systems *manager* with from May 1, 2002, to July 30, 2004. The supporting letter from states that the Beneficiary was employed part-time as an information systems *engineer* from May 1, 2002, to July 30, 2004. The job titles are inconsistent, and the inconsistency has not been resolved with independent, objective evidence. *See id.*

Further, the letter from verifies the Beneficiary's experience as follows: experience with business intelligence and performance management software tools, and experience with data and systems interactions, including IT tools and technology. However, the labor certification requires experience in healthcare product innovation, consulting, product development, and business strategy. description of the Beneficiary's job title and duties does not establish that they were in the occupations required by the labor certification. Therefore, the Petitioner cannot rely on the Beneficiary's experience with to qualify the Beneficiary for the proffered position.

In sum, the record establishes the Beneficiary's approximately 68.5 months of qualifying full-time experience. Part H.10 of the labor certification requires 84 months of qualifying full-time experience.[8] Thus, the Petitioner did not establish that the Beneficiary met the minimum experience requirements of the offered position set forth on the labor certification as of the priority date.

C. Ability to Pay the Proffered Wage

Although not addressed by the Director, we additionally independently note that the record does not establish that the Petitioner has demonstrated its ability to pay the proffered wage as of the August 17, 2015, priority date onward.

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

[7] Full-time means at least 35 hours or more per week.

[8] The Beneficiary's employment with and satisfies the specific skills required by Part H.14. of the labor certification.

> 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). The proffered wage is $170,000 per year.

In this case, the record does not contain annual reports, federal tax returns, or audited financial statements for the Petitioner from 2015 onward as required by 8 C.F.R. § 204.5(g)(2).[9] Although we note that the 2015 tax return might not have been available at the time of filing, in any future proceedings, the Petitioner must submit regulatory-required evidence of its continuing ability to pay the proffered wage. Therefore, the record does not contain evidence to establish that the Petitioner has the continuing ability to pay the proffered wage from 2015 onward.

D. Successor-In-Interest

The Petitioner's website indicates that acquired the Petitioner in 2016. *See* (last visited Mar. 21, 2017). If claims to be the successor-interest to the Petitioner, in any future proceedings it must establish that it meets three requirements. First, must fully describe and document the transaction transferring ownership of all, or a relevant part of, the Petitioner. Evidence of transfer of ownership must show that purchased the essential rights and obligations of the Petitioner necessary to carry on the business. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

Second, must demonstrate that the job opportunity is the same as originally offered on the labor certification. To ensure that the job opportunity remains the same as originally certified, must continue to operate the same type of business as the Petitioner, in the same metropolitan statistical area, and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482. Third, must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects,

[9] The record contains the Beneficiary's IRS Form W-2, Wage and Tax Statement, issued by the Petitioner in 2015, and the Petitioner's 2014 IRS Form 1120, U.S. Corporation Income Tax Return. The Petitioner indicated on the Form I-140 that it employs 42 workers.

including establishing the Petitioner's ability to pay the proffered wage form the priority date until the date of transfer, and its ability to pay the proffered wage from the date of transfer onward. *Id.*

II. CONCLUSION

The Petitioner has not established that the Beneficiary meets the minimum experience requirements of the labor certification. The Petitioner has also not demonstrated its ability to pay the proffered wage as of the priority date.

In visa petition 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of Q-H-, Inc.*, ID# 116789 (AAO Mar. 22, 2017)