U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-G-S- INC

DATE: MAR. 29, 2017

TEXAS SERVICE CENTER DECISION

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

The Petitioner, an IT and software development business, seeks to permanently employ the Beneficiary in the United States as a senior programmer/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 Directorof the Texas Service Center denied the petition. The Director determined that the Petitioner had not established that it intends to employ the Beneficiary in accordance with the labor certification. The Director also determined that the Petitioner had not established that the petition was supported by a *bona fide* job offer.

The matter is now before us on appeal. The Petitioner reasserts its intention to employ the Beneficiary in accordance with the terms of the labor certification. The Petitioner asserts that it has submitted sufficient evidence to establish that a *bona fide* job offer exists. Upon *de novo* review, we will withdraw the Director's decision and remand the case for further proceedings as outlined below.

I. LAW AND ANALYSIS

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). 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. 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, 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. Finally, if USCIS approves the immigrant visa 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.

A. Valid Labor Certification

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the ETA Form 9089. 20 C.F.R. § 656.30(c)(2). *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979). In this case, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL.[1] The priority date of the petition is February 2, 2015.[2]

At Part C of the labor certification the Petitioner listed its address as Texas. The Petitioner indicated in Part H of the labor certification that the Beneficiary's primary worksite would be at that same address. When the Petitioner filed the current petition it again listed this address as both its company's address and as the Beneficiary's worksite.

The Director issued a notice of intent to deny (NOID) and noted that Part H of the labor certification states that the primary worksite is the Petitioner's address in Texas, while Part J of the labor certification lists the Beneficiary's address in New Jersey, and Part K of the labor certification indicates that the Beneficiary had worked for the Petitioner in Texas, from December 3, 2013, through February 2, 2015. The labor certification does not allow for any work locations other than the Petitioner's address, and does not allow for telework.

In response to the NOID the Petitioner affirmed its intention to employ the Beneficiary at its location in Texas, in accordance with the job offer detailed in the labor certification. The Director denied the petition after concluding that the labor certification would be invalid if the Petitioner "intends to employ the beneficiary at a location outside normal commuting distance of . . . Texas."

On appeal, the Petitioner again affirms that the Beneficiary "has every intention of working at the TX site for [the Petitioner.]" The Petitioner notes that "[r]elocation is common" and asserts that the Beneficiary's prior employment for the Petitioner as a remote employee from his home in New Jersey should not be interpreted to contradict his "intention to accept a new position in a new city upon approval of an I-140."

The Petitioner's New Jersey Form NJ-W-3, Reconciliation of Tax Withheld, dated January 13, 2015, confirms that the Petitioner employed the Beneficiary in New Jersey. However, the Beneficiary's past employment for the Petitioner in New Jersey does not preclude future employment with the Petitioner at the location indicated on the labor certification. However, while the Petitioner affirms on appeal its desire to employ the Beneficiary at its office in a USCIS site visit at the Petitioner's office on April 27, 2016, raises questions regarding the Petitioner's actual onsite employment and additional information is required to determine whether the Petitioner is able to

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

offer work onsite at the location listed on the labor certification. Therefore, the petition will be remanded to the Director to allow an opportunity to address this point.

B. *Bona Fide* Job Offer

The Petitioner must establish that its job offer to the Beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the Petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the Beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

As stated above, the Director determined that the initial evidence submitted by the Petitioner did not establish eligibility and issued a NOID consistent with 8 C.F.R. § 103.2(b)(8). The Director requested the Petitioner to submit evidence that a *bona fide* job offer exists; specifically, the director requested evidence of the location of the intended employment, copies of any contracts under which the Beneficiary would be employed, identification of who would pay the Beneficiary, clarification of whether the Beneficiary would be paid a fixed wage or if the pay would be determined by available contracts, identification of who would supervise and control the Beneficiary's work, and identification of who owned the equipment that would be used by the Beneficiary in his work.

In response, the Petitioner affirmed that it would pay the proffered wage listed on the labor certification and stated that there are "no contracts under which the beneficiary will be employed" because the Beneficiary would be employed directly by the Petitioner at its office in , Texas. The Petitioner stated that it had "already submitted evidence in the form of a support letter of a bona fide job offer." The Director denied the petition after concluding that the Petitioner had not established that a realistic job offer existed.

On appeal, the Petitioner asserts that it had "submitted the necessary documents to evidence the bona fide job offer" for the location. However, the April 2016 USCIS site visit calls into question the Petitioner's ability to employ the Beneficiary there. From the visit, it is unclear how many workers could work in the Petitioner's headquarters space, and how many workers actually work onsite. Officers were told that of the Petitioner's claimed 90 H-1B employees, only one actually worked onsite, while the rest "are working at client sites" and though the Petitioner has repeatedly claimed to employ over 200 total workers, the officers seem to have encountered just four employees during their site visit. The labor certification doesn't allow for work at any other location.

On remand the Director may request additional evidence such as an organizational chart and any payroll reports that show how many of the Petitioner's employees work onsite at its office location, and how many work at other locations under contract, as well as a breakdown of how many labor certifications have been filed for workers to be employed for onsite office positions compared with the labor certifications filed for workers identified to work at other locations, and documented by sending pages or copies of corresponding ETA Forms 9089. The Director may also

request documentation of the Petitioner's office space, and evidence of the availability of office space for its onsite workers.

C. Ability to Pay the Proffered Wage

The record does not contain sufficient evidence to determine if the Petitioner has the continuing ability to pay the $173,056 proffered wage as of the February 2, 2015, priority date. The regulation 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 this case, the Petitioner has submitted a copy of an IRS Form W-2 showing the Beneficiary was paid $72,000 in 2015, which is significantly less than the $173,056 proffered wage. The Petitioner has not submitted copies of its annual reports, federal tax returns, or audited financial statements to show its net income or net current assets since the February 2, 2015, priority date.[3]

In addition, where a petitioner has filed multiple petitions, we will also consider the petitioner's ability to pay the combined wages of each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108 (D. Mass. 2014); *see also Great Wall*, 16 I&N Dec. at 144-45. We note that while the Petitioner claimed 200 employees on the labor certification, USCIS records reveal that the Petitioner has filed 125 Form I-140 petitions and 447 Form I-129 nonimmigrant petitions since February 2, 2010 (five years prior to the current priority date).

In his request for evidence (RFE), the Director requested the Petitioner to identify all Form I-140 petitions it filed in 2015 and 2016, to identify the status of each petition, to identify each beneficiary's priority date and proffered wage, and to submit evidence of wages paid to each beneficiary as of the priority date of the instant petition. In response, the Petitioner stated that it had satisfied its ability to pay the proffered wage to the current Beneficiary by a preponderance of the evidence, and that the Director's request for evidence relating to the beneficiaries of its other employment-based petitions was an unduly burdensome and oppressive request. Contrary to the Petitioner's claim that the Director's request was arbitrary and capricious, we find the requested evidence to be necessary for the adjudication of the petition.

The Petitioner noted in response to the RFE that the regulations allow USCIS to accept, in some cases, a statement from the company's financial officer in place of the evidence required by

[3] Based on the date of filing, the Petitioner's tax return for 2015 would not have been available.

regulation to establish its ability to pay the proffered wage. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "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." *Id.* (emphasis added).

Given the record as a whole, including the number of employment-based immigrant petitions filed by the Petitioner, the lack of documentation from the Petitioner regarding its net income and net current assets since the priority date,[4] and the lack of information from the Petitioner regarding its payment of proffered wages to its other sponsored workers, we find that we need not exercise our discretion to accept the letter from the Petitioner's finance manager, alone, as proof of its ability to pay the proffered wage.

The evidence in the record does not document the Petitioner's net income and net current assets since the priority date, nor does it document the priority date, proffered wage or wages paid to each of the beneficiaries of the other employment-based immigrant petitions filed by the Petitioner. We also note that the Petitioner appears to have outstanding tax debts owed to the states of Illinois, New York, South Carolina, and Oklahoma. These debts might be considered in the determination of the overall totality of the Petitioner's circumstances pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The Petitioner's continuing ability to pay the proffered wage to the Beneficiary must be addressed on remand.

D. The Beneficiary's Employment Experience

A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating a beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey*, 661 F.2d 1 (1st Cir. 1981).

The labor certification, at Line H.6-A, requires 60 months of experience in the offered job. Line H.11 requires the Petitioner to list information about the job duties of the offered job, and Line H.14

[4] The Petitioner submitted copies of its IRS Form 1120 corporate income tax returns from before the priority date in 2012, 2013, and 2014. The 2013 return is marked "PROFORMA TAX RETURN - ACCRUAL BASIS - FOR DISCUSSION PURPOSES ONLY." We note that the Petitioner's gross receipts decreased by $14,537,319 from 2012 through 2014, and the salaries paid by the Petitioner decreased significantly from $14,062,964 to $1,425,178 during the same period.

asks the Petitioner to list specific skills or other requirements, if any. The Petitioner appears to have listed extensive specific requirements at Line H.11, instead of at Line H.14. The Petitioner specified that the offered position requires:

> . . . . Experience in SAP-PM, SM, WM, MM, APO, EWM, HR/Human Capital Management (HCM), SD (OTC, Pricing, Billing, LE, EDI) with in depth knowledge of configuring modules based on the business requirement, guiding ABAP Programmers, Gap Analysis writing functional specifications or Experience SAP Netweaver Technology, Extensive configuration knowledge and development of Netweaver portal, knowledge management and collaboration. Expertise in SAP Portal design specification, documentation, development, configuration, testing, troubleshooting, administration and performance or ABAP programmers with hands on programming experience in SAP R3 with multiple SAP functional modules. Experience with RICEF (Reports, Interfaces, Conversions, Enhancements, Forms), BADI, BAPI, Webdynpro, Portal, ESS/MSS, SAP Scripts, Smart Forms, LSMW, BDC, FPM, Workflow, ALE, EDI, IDOC. [E]xperience in analysis, design, system development, unit testing system testing, documentation, implementation, client interaction, capturing user requirements, reviewing design documents or SAP BI Developer with hands [on] experience on developing application is SAP-BW/BI, SAP BODS and BOBJ. Experience with Data Modeling, Extraction, Data Staging, loading, transformations and Reporting. Experience in SAP BW/BI Tools like BEx Analyzer, BW Process chains, BEx Web, OLAP, MDX, Web Application Designer, BW Administrator Workbench. Experience in SAP system administration, monitoring and support. Experience in designing SAP OSS Notes, Support packages, Kernel Patches, Transport management system (TMS), Batch job scheduling, Solution Manager Setup. Experience in designing SAP Security Roles identifying SOD's, building SOD Matrix and in creating new SAP Security Roles that represent the different end users job definitions. Experience in analyzing trace files (system and database) and tracking the issue to solve the problem. Good to have Experience as a Certified SAP analyst, Instructional Design, it Lead, Coordinator, Instructional Designer, Trainer, Project Management experience, Gap Analysis, BPR (Business Process Reengineering) and Support Analyst.

The labor certification states that the Beneficiary worked as a senior software engineer for [redacted] in [redacted] India, from November 27, 2006, until October 30, 2013. A corresponding employment letter on company letterhead corroborates the dates of the Beneficiary's employment and confirms that the Beneficiary gained experience with a number of the skills that the Petitioner listed as what appears to be experience requirements on the labor certification. However, the letter does not list any experience with SAP- SM, EWM, ESS/MSS, SAP Scripts, FPM, Workflow, SAP BW/BI, or with tools like BEx Analyzer, BW Process chains, BEx Web, OLAP, MDX, Web Application Designer, or BW Administrator Workbench. The letter does not list experience in SAP system administration, monitoring and support, or in designing SAP Security Roles, identifying SOD's, building SOD Matrix, or in creating new SAP Security Roles that represent the different end users' job definitions. The letter does not list experience in analyzing

trace files (system and database) or tracking the issues to solve the problem. Finally, the experience letter does not reflect any experience as a Certified SAP analyst, Instructional Design, IT Lead, Coordinator, Instructional Designer, Trainer, Project Management experience, Gap Analysis, BPR (Business Process Reengineering) or a Support Analyst.[5] Thus, the evidence in the record does not establish that the Beneficiary possessed the required experience set forth on the labor certification by the priority date, and the Petitioner should be allowed to address this on remand.

II. CONCLUSION

In view of the foregoing, the previous decision of the Director will be withdrawn. The petition is remanded to the Director. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

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

Cite as *Matter of A-G-S- Inc*, ID# 67842 (AAO Mar. 29, 2017)

[5] On the labor certification, the Beneficiary also claimed employment in the offered job with the Petitioner since December 13, 2013. Here, the Beneficiary indicates in response to question K.1 that his position with the Petitioner was as a systems analyst, 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. 20 C.F.R. § 656.17(h)(4)(i)(3). Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the Beneficiary's experience with the Petitioner was in the position offered, the experience may not be used to qualify the Beneficiary for the proffered position.