U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-I-S-, INC.

DATE: NOV. 29, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of information technology staffing and consulting services, seeks to employ the Beneficiary as a software engineer. It requests his classification 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)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national 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 Texas Service Center denied the petition, concluding that the Petitioner did not establish the Beneficiary's possession of the minimum experience required for the offered position. Specifically, the Director found that the Petitioner did not demonstrate that the Beneficiary gained qualifying experience with it in a job substantially different than the offered position.

On appeal, the Petitioner asserts that inconsistencies in its descriptions of the Beneficiary's current job duties were inadvertent.

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

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer applies for 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). DOL must determine whether the United States has able, willing, qualified, and available workers for an offered position, and whether employment of a foreign national would hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If DOL certifies a foreign national to permanently fill an offered position, an employer must submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves a petition, a foreign national may finally 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.

II. THE MINIMUM EXPERIENCE REQUIRED FOR THE OFFERED POSITION

A petitioner must establish a beneficiary's possession, by a petition's priority date, of all DOL-certified job requirements of an offered position. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the accompanying labor certification states the minimum requirements of the offered position of software engineer as a master's degree and six months of experience in the offered position, as a systems analyst, or in a related occupation. The Beneficiary's educational qualifications are not at issue.

On the labor certification, the Beneficiary attested to his possession, before the petition's priority date, of more than three years of qualifying experience. Since March 2011, the Beneficiary stated that the Petitioner has employed him as a systems analyst. The Beneficiary did not list any other qualifying experience.

A labor certification employer cannot rely on experience that a foreign national gained with it, unless he or she gained it in a position substantially different than the offered job, 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). The Petitioner asserts that the Beneficiary gained qualifying experience with it in a substantially different job. A position is substantially different if it requires performance of the same job duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

As indicated in our request for additional evidence (RFE), the record contains discrepancies in the Petitioner's descriptions of the Beneficiary's current job duties as a systems analyst. In a 2015 letter, the Petitioner's vice president stated that the Beneficiary's job duties include "[d]evelop[ing], test[ing], [and] document[ing] software client server, ecommerce applications, databases, [and] data warehousing modules." These are the same tasks the Petitioner listed on the labor certification as the job duties of the offered position of software engineer, indicating that the former position and the offered position are substantially comparable. In a 2016 letter, however, the vice president stated that, as a systems analyst, the Beneficiary "did not perform any duties to be performed as *Software Engineer*." (emphasis in the original).

In response to our RFE, counsel asserts that the Petitioner inadvertently included the job duties of the offered position in the earlier description of the Beneficiary's current duties. Counsel's assertion,

[1] This petition's priority date is December 17, 2014, the date the U.S. Department of Labor (DOL) accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

however, does 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)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

The Petitioner's vice president also indicated in another 2015 letter that the Beneficiary's offered and current positions share common duties. The letter states: "The Beneficiary has over three years of experience *in the position offered* as a Systems Analyst." (emphasis added). This second discrepancy casts further doubt on the Petitioner's claims that the positions are substantially different and that the other discrepancy resulted from an inadvertent error. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistences of record by independent, objective evidence pointing to where the truth lies).

Also in response to our RFE, the Petitioner submitted an October 2017 letter from its vice president which states "[the Beneficiary] is currently employed at the present time with our organization full-time as a Systems Analyst and has been employed in that position since March 1, 2011. [The Beneficiary] is currently employed with our organization as a Programmer Analyst. . . ." The naming of two positions currently filled by the Beneficiary adds to the confusion about what experience the Beneficiary has gained with the Petitioner and whether or not it is substantially comparable to the offered position. Based on the foregoing, we find that the Petitioner has not sufficiently explained the discrepancies in the descriptions of the Beneficiary's experience.

In addition, the organizational chart the Petitioner submitted in response to our RFE does not list the offered position of software engineer or otherwise provide any information on how the positions of systems analyst and software engineer differ.[2] The chart therefore does not support the claimed substantial difference between the Beneficiary's offered and current positions. Also, contrary to our RFE's instructions, the Petitioner did not specify the percentages of time spent on the duties of each position. *See* 8 C.F.R. § 103.2(b)(14) (allowing USCIS to deny a petition if a petitioner does not submit requested evidence precluding a material line of inquiry). Without this information we cannot fully analyze the differences between the two positions. Therefore, the discrepancies regarding the two positions, as well as the deficiencies in the evidence concerning the duties of the former and offered position, preclude us from finding that the two positions are not substantially comparable.

For the foregoing reasons, the Petitioner has not established the Beneficiary's possession of the minimum experience required for the offered position.

[2] On the Form I-140, immigrant Petition for Alien Worker, the Petitioner reported that the offered position of software engineer is not a new position. It is therefore unclear why the submitted organizational chart does not include this position. The Petitioner must address this discrepancy in any further filing in this matter.

III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the Petitioner also has not demonstrated its 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.*

Here, the labor certification states the proffered wage of the offered position of software engineer as $79,186 a year. As previously noted, the petition's priority date is December 17, 2014. USCIS records indicate the Petitioner's filing of at least 101 other petitions that remained pending or approved after this petition's priority date. The Petitioner has not demonstrated that its annual pay to the Beneficiary equaled or exceeded the proffered wage. The Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this and the other petitions from December 17, 2014, until the beneficiaries of the other petitions obtained lawful permanent residence. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay combined proffered wages of multiple petitions).

The record does not indicate the proffered wages or priority dates of the Petitioner's other petitions. The record also does not contain evidence that: the Petitioner paid wages to the other beneficiaries; other petitions were denied, withdrawn, or revoked; or other beneficiaries obtained lawful permanent residence. Contrary to 8 C.F.R. § 204.5(g)(2), the record also lacks copies of the Petitioner's annual reports, federal income tax returns, or audited financial statements for 2015 and 2016.

In any future filings in this matter, the Petitioner must submit required evidence of its ability to pay the proffered wage in 2015 and 2016. It must also submit evidence of its ability to pay the combined proffered wages of this and its other petitions that were pending or filed after this petition's priority date.

IV. CONCLUSION

The Petitioner has not established the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of C-I-S-, Inc.*, ID# 467420 (AAO Nov. 29, 2017)