U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H.C.W-A-C-, LLC

DATE: OCT. 17, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an investment banking/biotechnology sector business, seeks to classify the Beneficiary as an individual of exceptional ability or 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).[1] This employment-based category allows U.S. businesses to sponsor foreign nationals for lawful permanent resident status if they have a degree of expertise significantly above that normally encountered in the sciences, arts, or business or an academic degree above a baccalaureate. The Petitioner also seeks Schedule A, Group II designation.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary worked in one of the occupations covered by Schedule A, Group II designation; that the Petitioner had the ability to pay the proffered wage; and that the Beneficiary had the experience required by the ETA Form 9089, Application for Permanent Employment Certification (labor certification).

On appeal, the Petitioner asserts that the Beneficiary will work in the sciences; that the Director incorrectly subtracted its equity from its net assets to conclude it did not, in fact, have any assets; and that the Beneficiary possesses relevant experience for the position offered.

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

[1] On the Form I-140, the Petitioner checked the box for extraordinary ability, which falls under section 203(b)(1)(A) of the Act and does not require a job offer. The initial cover letter referenced a related regulation, 8 C.F.R. § 204.5(h)(5). The Petitioner, however, also checked the box for Schedule A, Group II designation, a form of labor certification only applicable to certain classifications requiring a job offer and, thus, incompatible with the extraordinary ability classification. *See* 20 C.F.R. § 656.5. The Petitioner provided all of the general documentation required for this designation under 20 C.F.R. § 656.15(b), including an uncertified ETA Form 9089, Application for Permanent Employment Certification; a prevailing wage determination; and a copy of the required notice to its bargaining representative or employees. The Director's request for additional evidence cited to Schedule A, Group II regulations and his final decision referenced the second preference classification requirements and related regulations. The Petitioner has not challenged the Director's consideration of this case as filed under second preference seeking Schedule A, Group II designation. Accordingly, we will review the record under those requirements.

I. LAW

Second preference immigrant visas are available for qualified individuals who are advanced-degree professionals or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2) of the Act. An advanced degree is one above a baccalaureate.[2] 8 C.F.R. § 204.5(k)(2). Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.* Every petition under this classification must include one of the following three items: (1) an ETA Form 9089 from the Department of Labor, (2) an application for Schedule A designation, or (3) documentation to establish that the beneficiary qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. 8 C.F.R. § 204.5(k)(4)(i).

Schedule A, Group II designation requires that a petitioner submit evidence of the beneficiary's exceptional ability in the sciences or arts as demonstrated by widespread acclaim and international recognition from recognized experts in the field. 20 C.F.R. § 656.15(d)(1). In addition, the petitioner must satisfy at least two of seven criteria (for example awards, memberships, published material, and contributions). 20 C.F.R. § 656.15(d)(1)((i)-(vii).[3] In addition to verifying widespread acclaim and international recognition, the documentation presented must show that the beneficiary worked for the past year in a position that requires an individual of exceptional ability and that the beneficiary's services are sought for a position that requires an individual of exceptional ability. 20 C.F.R. § 656.15(d)(1). As with most filings for an employment-based immigrant that requires a job offer, this petition must include evidence that the prospective United States employer has the ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2).

II. ANALYSIS

According to the ETA Form 9089, the Petitioner seeks to employ the Beneficiary as a Respiratory Drug Delivery Consultant/PHRM Investment banker at a wage of $200,000. The same document reflects that the position requires a Ph.D. degree in pharmaceutics, and 108 months (nine years) of experience in the job offered, accepting no alternate combination of education and experience. The Beneficiary has a Ph.D. degree in pharmaceutics from the The labor certification further indicates that she has been with the Petitioner since August 2014 as a senior financial analysist/biotechnology and previously worked for , as a senior scientist/inventor from 2010 through 2014.

The Director did not contest that the Beneficiary, who possesses a Ph.D. degree, was a member of the professions holding an advanced degree, but denied the petition on three other grounds. First, he

[2] The definition of advanced degree also includes a baccalaureate followed by at least five years of progressive experience. 8 C.F.R. § 204.5(k)(2).

[3] In *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010), we held that, "truth is to be determined not by the quantity of evidence alone but by its quality."

determined that she would not be working in the sciences or arts, as required for Schedule A, Group II designation. Second, he found that the Petitioner had no assets in 2015 and, therefore, had not established its ability to pay the $200,000 proffered wage. Finally, he concluded that she did not have the nine years of experience in "the job offered," as mandated by the ETA Form 9089.

For the reasons discussed below, while we withdraw the Director's first two concerns, we agree that the Beneficiary does not have the required experience. In addition, the record does not establish that she enjoys the necessary widespread acclaim and international recognition required for Schedule A, Group II designation.

A. Sciences or Arts

While Schedule A, Group II designation is limited to those with exceptional ability in the sciences or arts, that phrase is defined, for purposes of that provision as "any field of knowledge and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge or skill." 20 C.F.R. § 656.5(b)(1). Accordingly, we find that the Director's inquiry into whether the Beneficiary would be engaged in the sciences to be an overly narrow interpretation of "sciences or arts." Her financial analyses, informed by her knowledge in pharmaceutics, fall within a field of knowledge or skill that colleges and universities commonly teach. Therefore, we determine that her field does not exclude her from Schedule A, Group II designation.

B. Ability to Pay

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the foreign national that full amount, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay.[4]

We agree with the Petitioner that the Director incorrectly evaluated the financial statements in the record. It initially submitted an audited balance sheet as of December 31, 2015, showing assets of $9,400,867, including $6,059,930 in cash. Its total liabilities were $4,352,623. The Director concluded that because its total liabilities and member's equity was also $9,400,867, the company had no assets. As the Petitioner correctly notes on appeal, the Director erred in applying this analysis. A basic rule of accounting holds that equity equals assets minus liabilities, which means that assets must be the same as liabilities plus equity. Barron's Dictionary of Accounting Terms 163

[4] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. Appx. 292 (5th Cir. Sept. 30, 2015).

(3rd ed. 2000). The fact that the balance sheet correctly reflects this formula does not mean the company had no assets.

We look now at the issue of net current assets. The balance sheet does not separate out current assets or current liabilities such that we can calculate net current assets. Nevertheless, the document shows that the Petitioner ended 2015 with over $6 million in cash, a current asset. Even if we were to assume all of its liabilities were current ones, that would leave net current assets of $1,707,307, well above the $200,000 it has offered the Beneficiary. Accordingly, the Petitioner has established its ability to pay the proffered wage.

C. The Beneficiary's Experience

The Director concluded that the Beneficiary's only performance in the job offered was with the Petitioner and, because the employment opportunity on the ETA Form 9089 is the same as the tendered position, she cannot rely on that service.[5] The Director noted the Petitioner's answer to question 21, Part J, of the ETA Form 9089, responding that she did not gain the necessary experience with them. The Director then found that her prior work with [redacted] varied from the job offered. On appeal, the Petitioner notes that the Beneficiary's current occupation differs from the one offered[6] and maintains that her nine years as a pharmaceutical scientist qualify her for the proffered position.

The position Respiratory Drug Delivery Consultant/Pharmaceutics Investment Banker combines occupations according to line 15, Part H of the ETA Form 9089; however, the investment banker portion is an integral part. Line 14, Part H, of the ETA Form 9089, reflects that is the position requires having passed the FINRA Exams Series 7, 63, and 79 "as necessary to work as [an] investment banker." While the Petitioner explains on appeal how the Beneficiary's pharmaceutical proficiency relates to the proffered position, it checked the box on line 10, Part H, of the labor certification, indicating that experience in an alternate occupation was not acceptable. Thus, to comply with its labor certification, the Petitioner must document that the Beneficiary has the necessary time in the job offered. As discussed below, the record does not demonstrate that she worked nine years as a Respiratory Drug Delivery Consultant/Pharmaceutic Investment Banker, or, in fact, in any occupation.

First, if the Petitioner affirms that its proffered position differs from the one the Beneficiary currently holds, then her time there does not contribute to the mandated work requirement. Moreover, that employment only amounted to 28 months as of the date of filing. Accordingly, the Petitioner would still have to document that she had an additional 80 months in the requisite role.

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[5] *See* 20 C.F.R. § 656.17(i)(3).

[6] This assertion raises a concern as to whether, during the past year, the Beneficiary worked in a position that requires an individual of exceptional ability. 20 C.F.R. § 656.15(d)(1).

Second, while not mentioned by the Director, the Petitioner has not documented the Beneficiary's previous engagement in any position. The only prior employer on the ETA Form 9089 is where, according to the form, she worked from 2010 through 2014, which is less than nine years or even 80 months. In addition, evidence of experience shall consist of letters from past employers containing the author's name, address, and title, and a specific description of the duties. 8 C.F.R. § 204.5(g)(1). The record does not contain a letter from or the previous employers on the Beneficiary's curriculum vitae confirming her time and duties there.

Third, the Petitioner does not establish that the Beneficiary's prior pharmaceutical research activities qualify her for the position. For example, her duties as a senior scientist/inventor at a pharmaceutical company, listed on the ETA Form 9089 include: serving as an in-house project manager and principal liaison for all collaborating pharmaceutical companies, organizing and presenting at meetings with respiratory and allergy experts, and developing patentable innovations. While we acknowledge the Petitioner's affirmation that this experience is relevant to the offered position, the duties differ significantly from the offered position. Further, according to her curriculum vitae, she did not complete the necessary FINRA examinations until after she began working for the Petitioner. As the job offered requires passage of those tests, she could not have nine years in that position, as required on the ETA Form 9089. For all of these reasons, it has not documented that she meets the requirements on the labor certification.

D. Widespread Acclaim and International Recognition

Schedule A, Group II designation requires that the Petitioner must satisfy at least two of the criteria listed at 20 C.F.R. § 656.15(d)(1)(i)-(vii). The submission of evidence suggested under this provision does not, however, in and of itself, establish eligibility for the benefit. We have held:

> [The t]ruth is to be determined not by the quantity of evidence alone but by its quality. [*Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm'r 1989).] Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Chawathe, 25 I&N Dec. at 376. *See also Matter of Allied Concert Services*, 88-INA-14 (BALCA 1988) (holding that the various kinds of documentation mentioned in the regulation are suggested as possible methods of proof).

The Petitioner documented that the Beneficiary satisfied the necessary two criteria, but the record does not reflect that she enjoys widespread acclaim or international recognition. Specifically, if we assume that pharmaceutics, and not finance, remains her field, she has judged the work of others in the same or an allied field as a peer reviewer and authored scholarly articles in her field. 20 C.F.R. § 656.15(d)(1)(iv), (vi). The evidence, however, does not establish her widespread acclaim and international recognition accorded by recognized experts in her field. 20 C.F.R. § 656.15(d)(1).

The Petitioner has not shown that the materials satisfying the criteria demonstrate the Beneficiary's exceptional ability. Peer reviewed journals rely on numerous volunteers to judge the manuscripts that prospective authors submit for publication. The record contains insufficient evidence that the Beneficiary's review of a single article is indicative of widespread acclaim and international recognition. Specifically, the Petitioner did not document that she received requests from several international journals, served on an editorial board of a prestigious journal, or otherwise show how her one-time participation in the prevalent peer review process distinguishes her from others in her field. In addition, while she authored five articles and a book chapter, the Petitioner did not corroborate the significance of these items, such as, but not limited to, citations.

The remaining filings do not confirm the Beneficiary's eligibility. First, the record contains her patent applications. While a patent is reflective of the originality of the innovation, it does not demonstrate the invention's ultimate significance. The record contains no license agreements or other items, including reference letters, that might describe how these discoveries have impacted the field and garnered the inventors acclaim and international recognition. Second, the Petitioner presented several invitations to the Beneficiary to speak at various conferences. Some of these letters merely request a proposal or application, while others appear to be less conditional. Several of them are annual symposiums of which sponsor hundreds of speakers. Without more information about the nature of these requests, the Petitioner has not met its burden of proof to corroborate that they are indicative of widespread acclaim. For these reasons, it has not established that the Beneficiary is eligible for Schedule A, Group II designation.

III. CONCLUSION

The Petitioner has not demonstrated that the Beneficiary has the necessary experience in the job offered or enjoys the requisite widespread acclaim and international recognition.

ORDER: The appeal is dismissed.

Cite as *Matter of H.C.W-A-C-, LLC*, ID# 583535 (AAO Oct. 17, 2017)