U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-H-&L-I- CO.

DATE: APR. 19, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of insurance and financial services, seeks to employ the Beneficiary as an application development senior specialist. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. 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 with a master's degree, or a bachelor's degree followed by five years of experience, for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish the Beneficiary's possession of the experience required for the offered position. Specifically, the Director found that, contrary to his request, the Petitioner did not submit original letters from the claimed, former employers of the Beneficiary or explain their unavailability.

On appeal, the Petitioner submits additional evidence and states that the Director did not request original letters from the Beneficiary's former employers. It also asserts that the record establishes the Beneficiary's possession of the required experience for the position.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further proceedings consistent with the following opinion.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign national, an employer must first obtain 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 approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.* If the DOL certifies a position, an employer must next 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. REQUIREMENTS OF THE OFFERED POSITION

A petitioner must establish a beneficiary's possession, by a petition's priority date, of all DOL-certified job requirements.[1] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. 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 authority for setting the *content* of the labor certification") (emphasis added).

Here, the labor certification states the minimum requirements of the offered position of application development senior specialist as a bachelor's degree and five years of experience in the job offered or in "[a]ny IT [information technology] position." Part H.14 of the certification, "Specific skills or other requirements," reiterates those requirements and adds criteria.

On the labor certification, the Beneficiary attested that, before he began working in the offered position for the Petitioner in January 2015, he gained more than seven years of full-time, qualifying experience with other U.S. employers.[2] He stated that he worked for one technology consulting company (the first employer) as an "associate – projects" from November 2007 to December 2013, and for another (the second employer) as a "project associate 6" from December 2013 to January 2015.

The Petitioner submitted letters regarding the Beneficiary's claimed experience at both former employers. *See* 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to support a beneficiary's qualifying experience with letters from former employers). In a request for additional evidence (RFE), however, the Director stated that the documents did not establish the Beneficiary's qualifying experience. The RFE questioned the authenticity of the first employer's letter. The notice also stated that the letter from the Beneficiary's purported former supervisor at the second employer did not comply with regulations because it was not on the employer's stationery.[3]

The RFE stated that:

> the signature and heading logo appear[] to be electronically affixed [on the first employer's letter. As to the Beneficiary's claimed experience with the second employer], the petitioner submitted a document from a former manager. However, this

[1] This petition's priority date is June 29, 2016, the date the 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).

[2] A labor certification employer cannot rely on experience that a foreign national gained with it, unless the worker obtained the experience in a substantially different position or the employer can demonstrate the impracticality of training a U.S. worker for the offered position. *See* 20 C.F.R. § 656.17(i)(3). The Petitioner here does not assert reliance on the Beneficiary's experience with it.

[3] The Petitioner also submitted a copy of the second employer's offer letter to the Beneficiary, which was on the company's letterhead. Dated before the Beneficiary's start date with the employer, however, the letter does not confirm the company's employment of him.

> letter was not issued by the former employer. Therefore, it does not conform to the regulation requirements for evidence of qualifying experience. If the petitioner intends to substantiate the beneficiary's experience with [the second employer], the petitioner must provide a letter from the former employer, drafted on official company letterhead fully describ[ing] the beneficiary's experience. Please submit evidence that the beneficiary meets all of the requirements listed on the labor certification as of June 29, 2016, the priority date.

In its RFE response, the Petitioner submitted copies of new letters from both employers and payroll documents from the relevant periods documenting the companies' employment of the Beneficiary. The Director, however, found that, contrary to his request, the Petitioner did not provide originals of the employers' initial letters or explanations of their unavailability. *See* 8 C.F.R. § 103.2(b)(14) (stating that "[f]ailure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request"). The decision stated: "Without the original experience letters [or explanations of their absence], the petitioner has not demonstrated that the beneficiary met the [labor certification] experience requirements as of the priority date."

Regulations did not require the Petitioner to submit original letters from the Beneficiary's claimed, former employers. *See* 8 C.F.R. § 204.5(g)(1) (stating that legible photocopies of documents are generally sufficient). If the Director doubted the letters' authenticity, however, he could have requested the original documents. *Id.*; *see also* 8 C.F.R. § 103.2(b)(5) (allowing USCIS to request an original document "at any time").

As the Petitioner argues on appeal, however, the Director's RFE did not request originals of the employers' initial letters. The RFE questioned the authenticity of the initial letter from the first employer. But the notice did not instruct the Petitioner to submit the original letter or any additional evidence of the company's employment of the Beneficiary. Also, if the Petitioner intended to rely on the Beneficiary's claimed experience with the second employer, the RFE requested "a letter" on that company's stationery. But the RFE did not specify USCIS' need for the original, initial letter.

USCIS may not deny a petition based on lack of evidence that was neither required by regulation, nor requested. We will therefore withdraw the Director's decision.

The Petitioner asserts that the record establishes the Beneficiary's qualifying experience for the offered position. Evidence submitted on appeal, however, casts doubts on the Beneficiary's claimed experience. Contrary to the Beneficiary's statements on the labor certification, pay records and an offer letter from the first employer identify his position as "Programmer Analyst Trainee" in November 2007 and as "programmer analyst" in November 2008 and November 2009. The Beneficiary is not identified as an "associate-projects" until November 2010. The employment verification letters submitted from the first employer only identify and describe the position of "associate-projects." They do not mention the Beneficiary's apparent change of position from programmer analyst to associate-projects or describe the duties of a programmer analyst. Thus, the record does not establish the Beneficiary's job duties as a programmer analyst. Part H.14 of the certification states that the offered position requires "at least 5

years of progressively more responsible application development experience in a Healthcare Information Management department working in every phase of the SDLC lifecycle." If the Beneficiary did not obtain such experience until serving in the role of "associate-projects" in 2010, he may not have gained the requisite five years of experience before he assumed the offered position in January 2015. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

On remand, the Director should request additional evidence of the Beneficiary's qualifications for the offered position. If the Director questions the authenticity of any evidence, he must state the bases of his doubts and specifically request originals of any suspect documents. After affording the Petitioner a reasonable opportunity to submit evidence and receiving a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

USCIS erred in denying the petition based on lack of evidence that was neither required by regulation, nor requested. The record on appeal, however, does not establish the Beneficiary's qualifications for the offered position.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of C-H-&L-I-, Co.*, ID# 996970 (AAO Apr. 19, 2018)