U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-, INC.

DATE: APR. 18, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an information technology consultancy, seeks to employ the Beneficiary as a conversion developer. 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 for lawful permanent resident status to work in a job requiring at least a master's degree, or a bachelor's degree followed by five years of experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage of the offered position.

On appeal, the Petitioner argues that the Director disregarded evidence and circumstances establishing its ability to pay.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective 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 an offered 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 approves a position, an employer must next submit the labor 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. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and the requested classification. If USCIS grants 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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its ability to pay the proffered wage of an offered position, 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 tax returns, or audited financial statements. *Id.*

Here, the accompanying labor certification states the proffered wage of the offered position of conversion developer as $125,258 a year. The petition's priority date is February 8, 2018, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

As of the appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage in 2018, the year of the petition's priority date, was not yet available. The Director's decision primarily relied on financial information stated in the Petitioner's federal income tax return for 2017. As of this decision, copies of the Petitioner's annual report, federal tax return, or audited financial statements for 2018 should be available. We will therefore withdraw the Director's decision and remand the matter. On remand, the Director should ask the Petitioner to submit required evidence of its ability to pay in 2018 and afford it a reasonable period to respond. The Petitioner may also submit additional evidence of its ability pay in 2018, including evidence of wages paid to the Beneficiary.

Also, USCIS records indicate the Petitioner's filing of immigrant petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions that were pending or approved as of this petition's priority date, or filed thereafter. *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 grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[1]

USCIS records indicate the Petitioner's filing of three other petitions that were approved as of February 8, 2018.[2] On remand, the Director should notify the Petitioner of the other petitions and afford it a reasonable opportunity to provide their proffered wages and priority dates. The Petitioner may also submit evidence of: payments it made to relevant beneficiaries in 2018; their lawful permanent resident status, if applicable; and other evidence of its ability to pay the combined proffered wages, including materials in support of the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). As the Petitioner argues and *Sonegawa* requires, the Director on remand must consider the totality of the circumstances affecting the Petitioner's ability to pay.

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[1] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or, unless the matters remain pending on appeal, that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages after corresponding beneficiaries obtained lawful permanent residence, or before the priority dates of corresponding petitions.

[2] USCIS records identify the other petitions by the following receipt numbers: [redacted]
and [redacted]

III. THE BENEFICIARY'S QUALIFICATIONS

Although unaddressed by the Director, the record also does not establish the Beneficiary's qualifications 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). 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*, 656 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of conversion developer as a U.S. bachelor's degree or a foreign equivalent degree in information technology or a related field, plus "[f]ive years progressive experience in software development, testing and implementation." The labor certification states that the Petitioner will not accept any alternate combination of education and experience. The labor certification does not specify that the requisite experience must follow the bachelor's degree. But the Petitioner requests the Beneficiary's classification as an advanced degree professional. We therefore presume that the company intends to require experience that is post-baccalaureate in nature. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" to include a bachelor's degree "*followed by* at least five years of progressive experience in the specialty") (emphasis added).[3]

The Petitioner documented the Beneficiary's receipt of an Indian bachelor of science degree in information technology in 2008. The Petitioner, however, submitted an independent evaluation of the Beneficiary's foreign educational credentials stating that this three-year degree does not equate to a U.S. baccalaureate degree. *See Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977) (finding that a U.S. bachelor's degree typically requires four years of college or university study). The Beneficiary later received an Indian master of science degree in software engineering. The evaluation equates this degree to a U.S. master of science degree in computer information systems. Thus, the record does not establish the Beneficiary's possession of the degree required for the offered position until his receipt of the master's degree in February 2013.[4] The Petitioner must therefore demonstrate that the Beneficiary gained qualifying experience for the offered position during the five-year period between his receipt of the master's degree in February 2013 and the petition's priority date in February 2018.

As proof of the Beneficiary's qualifying experience, the Petitioner submitted a copy of a letter from an information technology company where the Beneficiary worked for more than seven years, from July 2008 to September 2015. Only about two years and seven months of the Beneficiary's experience

[3] If the offered position does not require post-baccalaureate experience, the petition may violate 8 C.F.R. § 204.5(k)(4)(1), which requires a labor certification accompanying a petition for an advanced degree professional to "demonstrate that the job requires a professional holding an advanced degree."

[4] The copy of the Beneficiary's master's degree diploma is not dated until March 2013. The Petitioner, however, submitted a copy of a provisional certificate regarding the degree, issued the prior month. A provisional certificate may establish a beneficiary's possession of a degree before the date of the degree's diploma. *See Matter of O-A-, Inc.*, Adopted Decision 2017-03 (AAO Apr. 17, 2017).

with this company, however, occurred following his receipt of the master's degree. Thus, this experience alone does not establish the Beneficiary's possession of the requisite five years of post-baccalaureate experience.

The labor certification indicates that, since November 2015, the Beneficiary has worked for the Petitioner. But an employer cannot rely on experience a foreign national gained with it, unless he or she gained the experience in a position substantially different from the offered one or the employer can demonstrate the impracticality of training a U.S. worker for the position. 20 C.F.R. § 656.17(i)(3). The Petitioner does not assert the impracticality of training a worker, nor does the record establish it. On the labor certification, the Beneficiary attested to his performance of the job duties of the offered position since March 2017. Therefore, under 20 C.F.R. § 656.17(i)(3), the Petitioner may not rely on that experience. The Beneficiary also attested that he worked in a different position for the Petitioner from November 2015 to March 2017. But the Petitioner did not submit a letter documenting and describing his experience during this period. *See* 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to support a beneficiary's claimed qualifying experience with letters from employers). Moreover, the record indicates that the Beneficiary would have gained only about one year and three months of qualifying experience in the other position. The combination of the Beneficiary's qualifying experience with the Petitioner (1 year and three months) and his former employer (two years and seven months) would total less than the requisite five years. The record therefore does not establish the Beneficiary's qualifications for the offered position.

On remand, the Director should notify the Petitioner of this deficiency and give the company a reasonable opportunity to respond. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

As of the appeal's filing, the record lacked required evidence of the Petitioner's ability to pay the combined proffered wages of this and other petitions for the year of the petition's priority date. The record also does not establish the Beneficiary's qualifications for the offered position.

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

Cite as *Matter of A-, Inc.*, ID# 4677485 (AAO Apr. 18, 2019)