In Re: 6221755

Date: DEC. 2, 2019

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a database administrator. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality 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 Director of the Nebraska Service Center denied the petition, concluding that the labor certification does not support the requested classification of advanced degree professional.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter to the Director for further consideration and entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies 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.

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[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is January 30, 2017. *See* 8 C.F.R. § 204.5(d).

II. THE ADVANCED DEGREE CLASSIFICATION

The Director concluded that the record did not establish that the labor certification supports the requested classification of advanced degree professional. Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the term "advanced degree" as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

In this case, the labor certification states that the minimum educational requirement is a U.S. master's degree or a foreign equivalent degree in computer science or mechanical engineering (Parts H.4, H.4-B, H.7, H.7-A, and H.9) and that the minimum experience requirement is 12 months of experience in the job offered or as a programmer analyst (Parts H.6, H.6-A, H.10, H.10-A, and H.10-B). Part H.8 does not permit an alternate combination of education and experience. Part H.14 of the labor certification ("Specific skills or other requirements") states, in part: "Will accept any equally suitable combination of education, training, and/or experience which would qualify an applicant to perform the duties of the job offered."[2]

The Director determined that the language at Part H.14 indicates that the Petitioner would accept "experience alone, or experience in conjunction with education of less than a baccalaureate degree level, as the equivalent of an advanced degree." We disagree.

Here, the minimum educational requirement is unchanged by the language in Part H.14 of the labor certification. The offered position requires an advanced degree because its minimum educational requirement is a U.S. master's or foreign equivalent degree. *See* 8 C.F.R. § 204.5(k)(2). Thus, we find that the labor certification supports the requested classification of advanced degree professional. We will therefore withdraw the Director's decision. However, for the reason discussed below, we will remand the matter to the Director.

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[2] The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

> If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

III. THE BENEFICIARY'S EXPERIENCE

The minimum experience requirement for the offered job of database administrator is 12 months of experience in the job offered or as a programmer analyst. Part H.14 also states, in part, that the required experience "must include 12 months using Teradata and Informatica." The duties of the offered job include:

> Coordinate changes to computer databases, test and implement the database applying knowledge of database management systems; plan, coordinate and implement security measures to safeguard computer databases; perform complex tasks; report directly to a project lead or manager; and use Teradata and Informatica.

The labor certification states that the Beneficiary worked for the Petitioner as a programmer analyst from August 20, 2015, to the date the labor certification was filed. Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1).

The Petitioner submitted a letter dated January 24, 2017, in support of the petition. The letter confirmed the Beneficiary's employment with the Petitioner as a programmer analyst from August 20, 2015, to the date of the letter. The letter stated his duties as follows:

> Develop, modify and maintain programs; gather and review user requirements; analyze, design, implement and install software; write and test programs and applications; maintain and enhance existing system; prepare logical and physical data models; extract, load and transform data in the data mart; design and develop ETL mappings; develop complex mappings in Informatica; use ETL processes to load data from various source systems; design and develop Teradata BTEQ scripts; code Teradata SQL, Teradata stored procedures, macros and triggers; develop UNIX shell scripts; migrate Informatica objects from 9.1 to 9.5; perform Informatica upgrade testing; and use Informatica, Teradata, Oracle, PL/SQL, XML, UNIX shell scripts, SSRS, Visual Studio, SVN, Tidal, Visio, ER/Studio, TOAD, Erwin and Control-M.

A labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience was in a job substantially different than the offered position or the employer demonstrates the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). For these purposes, a job is substantially different from an offered position 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). On the labor certification, in response to question J.21, which asks whether the Beneficiary gained any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested, the Petitioner answered "no." In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable and the terms of the labor certification provide that applicants can qualify through an alternate occupation.

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Here, both positions - database administrator and programmer analyst - appear to be responsible for the performance of the Petitioner's database using Teradata and Informatica.[3] Therefore, the Beneficiary's experience gained with the Petitioner appears to have been substantially comparable to the offered job, as he appears to have been performing the same job duties 50 percent or more of the time. According to DOL regulations, therefore, the Petitioner cannot rely on this experience for the Beneficiary to qualify for the proffered position. The record contains no other evidence of the Beneficiary's prior employment experience. A petitioner must establish that it meets each eligibility requirement by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. 369, 375-76 (AAO 2010).

Thus, based on the deficiencies described above, we cannot affirmatively find that the Beneficiary possessed the minimum experience required by the labor certification as of the priority date. On remand, the Director should request additional evidence of the Beneficiary's qualifications and allow the Petitioner reasonable time to respond.

IV. CONCLUSION

The Petitioner has established that the labor certification supports the requested classification of advanced degree professional. We will therefore withdraw the Director's decision on this issue. However, the Director's decision did not clarify whether the Beneficiary possessed the experience required by the labor certification as of the priority date. Thus, we will remand the matter to the Director for further consideration.

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

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[3] We note that the Petitioner indicated at Part H.12. of the labor certification that the job opportunity's requirements are not normal for the occupation. The record does not indicate how the Petitioner's requirements differ from the normal requirements for the position of database administrator.