



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF O-A-, INC.

DATE: MAR. 26, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of network computing products and services, seeks to employ the Beneficiary as a senior database engineer. 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 Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary’s possession of a master’s degree in the position’s required field of study.

On appeal, the Petitioner asserts that the Director disregarded its response to her notice of intent to deny (NOID) and used a new “standard” to evaluate the field of the Beneficiary’s degree in an impermissibly retroactive manner.

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 opinion.

I. EMPLOYMENT-BASED IMMIGRATION

Unless seeking Schedule A designation or a waiver in the national interest, immigration as an advanced degree professional 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 an offered 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

requirements of an offered position and a requested visa 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. THE REQUIRED FIELD OF STUDY

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *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 labor certification states the minimum educational requirements of the offered position of senior database engineer as a U.S. master's degree, or a foreign equivalent degree, in "Computer Science." The labor certification states that the Petitioner will not accept an alternate field of study.

The Petitioner provided copies of the Beneficiary's foreign educational credentials and an independent evaluation of the Beneficiary's credentials. The evaluation, supported by the Beneficiary's transcripts and an analysis of the specific courses taken, concludes that his degree equates U.S. master of science degree in computer science. Based on a review of the entire record, we find that a preponderance of evidence establishes the Beneficiary's possession of a master's degree in the required field of study.

III. THE REQUIRED EXPERIENCE

The Petitioner has overcome the denial ground. But the record does not establish the petition's approvability. A review of the record shows that the Petitioner has not demonstrated the Beneficiary's possession of the minimum experience required for the offered position.

In addition to the master's degree, the labor certification states that the offered position of senior database engineer requires at least two years of experience in the job offered or as a database administrator. Part H.14 of the labor certification also states that the experience must include work with various special skills, including: "Implementing Grid Control, Data Guard, RMAN backup and recovery procedures; use of LINUX; Performance monitoring and problem solving and analytic skills."

¹ This petition's priority date is June 28, 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).

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than five years of full-time qualifying experience in India. He stated that, from August 2006 to November 2011, he worked as a database administrator for a software services company.

Pursuant to 8 C.F.R. § 204.5(g)(1), the Petitioner submitted letters from the Beneficiary's former employer to support the Beneficiary's claimed qualifying experience. Two letters from an operations manager on the company's stationery confirm the Beneficiary's job title and dates of employment. But, contrary to 8 C.F.R. § 204.5(g)(1), neither letter describes his experience. The Petitioner also provided a letter from a purported former manager of the Beneficiary, describing the Beneficiary's experience and his work with the required special skills. The letter, however, states that its author managed the Beneficiary for less than two years and the record lacks corroborating evidence of the author's affiliation with the employer during the Beneficiary's tenure. The record therefore does not establish the Beneficiary's possession of the requisite two years of qualifying experience.

The Petitioner did not receive an opportunity to respond to these evidentiary deficiencies. We will therefore remand the matter. On remand, the Director should notify the Petitioner of the defects and ask it to submit additional evidence of the Beneficiary's claimed qualifying experience.

IV. THE VALIDITY OF THE LABOR CERTIFICATION

The record also does not establish the validity of the labor certification. Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification remains valid "only for the particular job opportunity" stated on it. 20 C.F.R. § 656.30(c)(2).

A petitioner may use another employer's labor certification only if the petitioner establishes itself as a successor in interest of the listed employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). A successor must demonstrate that it acquired the essential rights and obligations needed to operate a predecessor's business. For immigration purposes, a successor must also: fully describe and document the transaction(s) by which it acquired a predecessor; demonstrate that, except for the change of employer, the job opportunity remains the same as listed on the labor certification; and otherwise establish its eligibility as a petitioner, including the abilities of it and the predecessor to continuously pay the position's proffered wage from the petition's priority date onward. *Id.* at 482-83.²

Here, the labor certification does not list the Petitioner as the employer. Rather, the Petitioner provided evidence that its parent company acquired the labor certification employer about two

² There is a difference between a change due to a successor-in-interest and simply a change of employer. Without documentation of the transfer of the rights, obligations, and ownership of the predecessor, the new employer is not a successor-in-interest and must obtain its own labor certification from the DOL.

months after the DOL certified the application. The record, however, does not establish the Petitioner as a successor of the labor certification employer. A successor is “a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation.” Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Ops., USCIS HQ 70/6.2, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5)(AD09-37)* 2 (Aug. 6, 2009) (quoting *Black’s Law Dictionary*, 1473 (8th Ed. 2004)). As a successor, the Petitioner must establish its possession of the rights and obligations needed to carry on the predecessor’s business in the same manner. *See id* at 8. Online, government records indicate how the Petitioner’s parent, a publicly traded company, acquired the labor certification employer. *See* U.S. Secs. & Exch. Comm’n, “EDGAR/Company Filings,” <https://www.sec.gov/edgar/searchedgar/companysearch.html> (last visited Feb. 1, 2019). The parent formed a subsidiary to merge with the employer. The merger subsidiary then immediately ceased to exist, leaving the employer as the surviving entity and the ultimate subsidiary of the Petitioner’s parent. The record does not establish that the Petitioner or its parent assumed rights and duties of the employer. Rather, the labor certification employer appears to have survived the merger intact, continuing its business activities with the same rights and obligations it had before the transaction. In similar mergers, federal courts have found that “the rights and obligations of T, the acquired corporation, are not transferred, assumed or affected.” *Morgan v. Powe Timber Co.*, 367 F. Supp. 2d 1032, 1038 (S.D. Miss. 2005) (quoting *Binder v. Bristol-Myers Squibb Co.*, 184 F. Supp. 2d 762, 772 (N.D. Ill. 2001)). Here, the Petitioner has not demonstrated that it is now vested with the rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. *See* Neufeld Memorandum, *supra*, at 8. Without documentation of a transfer of rights and obligations from the labor certification employer, the Petitioner has not established itself as the employer’s successor in interest. The record therefore does not establish the validity of the labor certification for this particular job opportunity.

The Petitioner did not receive a chance to respond to this deficiency. On remand, the Director should therefore notify the Petitioner and ask it to submit additional evidence of its claimed status as the successor in interest of the labor certification employer.

V. CONCLUSION

Contrary to the Director’s decision, the Petitioner has demonstrated the Beneficiary’s possession of a master’s degree in the offered position’s required field of study. The record, however, does not establish the Beneficiary’s qualifying experience for the job or the validity of the accompanying labor certification.

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 O-A-, Inc.*, ID# 2796512 (AAO Mar. 26, 2019)