U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16945779

Date: JUN. 24, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a provider of information technology (IT) and engineering staff, seeks to employ the Beneficiary as a system engineer. The company requests her classification in the second-preference, immigrant category as a member of the professions holding an advanced degree or its equivalent. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum experience required for the offered position.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved 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 noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a designated noncitizen may 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 EXPERIENCE

A petitioner must demonstrate that a beneficiary met 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). This petition's priority date is September 3, 2019, the date 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).

In assessing a beneficiary's qualifications for an offered position, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum job 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 "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states the minimum educational requirements of the offered position of system engineer as a U.S. bachelor's degree, or a foreign equivalent degree, in electronics and communication engineering or an "equivalent" field. The certification also states that the position requires at least five years of progressive, post-baccalaureate experience in the job offered or in a related occupation.

On the labor certification, the Beneficiary attested that, by the petition's September 2019 priority date and her December 2015 start date of employment with the Petitioner, she gained nearly six years of full-time, qualifying experience in India.[1] She stated the following qualifying experience on the certification:

- About one year, 11 months as a software engineer for an engineering and business solutions company, from November 2005 to September 2007;
- About six months as an associate engineer for a manufacturing firm, from October 2007 to April 2008; and
- About three years, six months as a senior engineer for an IT joint venture, from April 2008 to October 2011.[2]

Although the labor certification states that the Beneficiary began working for the IT joint venture in April 2008, the record indicates that she did not join the joint venture until November 2008. From April 2008 through October 2008, one of the firms that formed the joint venture employed the Beneficiary. Copies of payroll records also indicate that the firm that began employing the Beneficiary in April 2008 continued paying her during her tenure at the joint venture.

[1] A labor certification employer cannot rely on experience that a noncitizen gained with the business unless the beneficiary gained the experience in a position substantially different than the offered one; or the employer can demonstrate the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). The Petitioner does not assert the Beneficiary's acquisition of qualifying experience with the company.

[2] A joint venture is a business that two or more entities undertake jointly while retaining their distinct identities. *See, e.g., Matter of Hughes*, 18 I&N Dec. 289, 290 (Comm'r 1982) (discussing joint ventures in the context of L-1 nonimmigrant visa petitions for intracompany transferees).

To support claimed qualifying experience, a petitioner must submit letters from a beneficiary's former employers. 8 C.F.R. § 204.5(g)(1). The letters must include the employers' names, titles, and addresses, and descriptions of the beneficiary's experience. *Id.* If such letters are unavailable, USCIS will consider other documentary evidence of the beneficiary's experience. *Id.*

The Petitioner submitted letters from all three of the Beneficiary's claimed former employers listed on the labor certification. Contrary to 8 C.F.R. § 204.5(g)(1), however, none of the letters describes the Beneficiary's experience. The letters therefore do not establish her qualifying experience for the offered position. Also, the letters from two of the employers - the engineering/business solutions company and the joint venture - do not state the Beneficiary's end dates of employment.

The petition also included affidavits from three purported former co-workers of the Beneficiary. The affidavits state the Beneficiary's dates of employment and job duties at each of the three former employers listed on the labor certification. The affidavits, however, do not explain how the purported former coworkers know the Beneficiary's former job duties. Also, the record lacks evidence corroborating the purported coworkers' employment during the Beneficiary's tenures at the companies. The affidavits therefore do not reliably corroborate the Beneficiary's claimed qualifying experience.

In response to the Director's request for evidence (RFE), the Petitioner submitted additional documentation of the Beneficiary's experience, including: an affidavit from her; and copies of service certificates, payroll records, letters, emails, and Indian tax documents regarding her former employment. The Beneficiary's affidavit does not demonstrate her claimed qualifying experience. She attested to the same information on the labor certification, and 8 C.F.R. § 204.5(g)(1) requires additional evidence of her claimed experience. The copies of the service certificates, payroll records, letters, emails, and tax documents establish the Beneficiary's dates of employment with the former employers as listed on the labor certification. But, contrary to 8 C.F.R. § 204.5(g)(1), these materials do not describe her experience. Also, the Petitioner has not demonstrated the unavailability of letters from her former employers describing her experience.

On appeal, the Petitioner submits additional evidence, including a statement in which the Beneficiary appears to assert that the joint venture's dissolution prevented her from obtaining a letter from the entity describing her experience.[3] But we do not accept evidence on appeal if a party previously received an opportunity to submit the materials. *Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). The Director's RFE states: "You may not submit secondary evidence in place of initial [required] evidence, unless you demonstrate that the initial evidence does not exist or cannot be obtained." As the Petitioner received notice and a reasonable opportunity to demonstrate the unavailability of employer letters describing her experience, we will not consider the appellate evidence. Even if we considered the additional materials and found that the joint venture's dissolution rendered a regulatory required letter from the entity unavailable, the evidence would not explain why the Petitioner could not submit required letters from the company that began employing the Beneficiary in April 2008 or her two other former employers.

[3] Online information confirms the joint venture's dissolution in 2017.

For the foregoing reasons, the Petitioner has not demonstrated the Beneficiary's possession of the minimum, qualifying experience required for the offered position. We will therefore affirm the petition's denial.

III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also does not establish the Petitioner's ability to pay the proffered wage of the offered position.

A petitioner must demonstrate its continuing ability to pay a proffered wage, 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 generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date onward. If a petitioner did not annually pay a beneficiary the full proffered wage or did not pay the beneficiary at all, USCIS examines whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[4]

The accompanying labor certification states the proffered wage of the offered position of senior engineer as $117,000 a year. As previously indicated, the petition's priority date is September 3, 2019.

The Petitioner submitted copies of payroll records and an IRS Form W-2, Wage and Tax Statement. These materials indicate that, in 2019, the company paid the Beneficiary $68,228.61. This amount does not equal or exceed the annual proffered wage of $117,000. Thus, based solely on wages paid, the Petitioner has not demonstrated its ability to pay the proffered wage.

The Petitioner submitted copies of its federal income tax return for 2017 and an audited financial statement for 2018. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks evidence of the company's ability to pay in 2019, the year of the petition's priority date.

The Petitioner also submitted a letter from its chief financial officer (CFO), asserting the company's ability to pay the proffered wage and its generation of annual revenues of more than $14 million. If a petitioner employs at least 100 workers, USCIS "may accept" a statement from a financial officer as proof of the business's ability to pay a proffered wage. 8 C.F.R. § 204.5(g)(2). Copies of the Petitioner's federal payroll tax returns indicate that, as of the third quarter of 2019, the company employed more than 170 workers. We may therefore consider the CFO's letter as proof of the Petitioner's ability to pay the proffered wage.

[4] Federal courts have upheld USCIS' 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); *Z-Noorani, Inc. v. Richardson*, 950 F. Supp. 2d 1330, 1345-46 (N.D. Ga. 2013).

USCIS records, however, indicate the Petitioner's filing of Form I-140 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 approval, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[5]

USCIS records show the Petitioner's filing of at least 26 other Form I-140 petitions that were pending or approved as of September 3, 2019, or filed thereafter.[6] Neither the CFO's letter nor other evidence of record provides the proffered wages or priority dates of the Petitioner's other petitions. Thus, we can't calculate the total, combined proffered wages that the company must demonstrate its ability to pay. Under these circumstances, we decline to accept the CFO's letter as proof of the Petitioner's ability to pay the proffered wage.

In any future filings in this matter, the Petitioner must submit copies of annual reports, federal tax returns, or audited financial statements for 2019 and 2020. The company must also provide the proffered wages and priority dates of its other petitions. The Petitioner may also submit additional evidence of its ability to pay, including proof of any payments to applicable beneficiaries during relevant years and materials supporting factors stated in *Sonegawa*. *See* 12 I&N Dec. at 614-15.

IV. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.

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

[6] USCIS records identify the Petitioner's other petitions by the following receipt numbers: