U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23890616

Date: JAN. 5, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree)

The Petitioner, an insurance company, seeks to permanently employ the Beneficiary as a "solutions architect." The company requests his classification under the second-preference, immigrant visa 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), 8 U.S.C. § 1153(b)(2)(A).

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 U.S. bachelor's degree as required by the accompanying certification from the U.S. Department of Labor (DOL). On appeal, the Petitioner argues that, on the certification application, the company inadvertently indicated its non-acceptance of a foreign bachelor's degree.

The Petitioner bears the burden of establishing eligibility for the benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We exercise de novo, appellate review. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Immigration as an advanced degree professional generally follows a three-step process. First, a prospective employer must apply to 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 won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

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(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(k)(3)(i)(B).

Finally, if USCIS approves a petition, a beneficiary may apply for an immigrant visa abroad or, if eligible, "adjustment of status" in the United States. *See* section 245(a)(1) of the Act, 8 U.S.C. § 1255(a)(1).

II. ANALYSIS

Advanced degree professionals must have "advanced degrees or their equivalents." Section 203(b)(2)(A) of the Act. The term "advanced degree" includes "a United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty." 8 C.F.R. § 204.5(k)(2).

The job-offer portion of an accompanying labor certification "must demonstrate that the job requires a professional holding an advanced degree." 8 C.F.R. § 204.5(k)(4)(i). A petitioner must also show that, by a petition's priority date, a beneficiary met all DOL-certified job requirements listed on a certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is August 24, 2021, the date 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).

When assessing a beneficiary's qualifications for an offered position, USCIS must examine an accompanying labor certification to determine the job's minimum requirements. The Agency may neither ignore a certification term nor impose unstated requirements. *E.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the burden of setting the *content* of the labor certification") (emphasis in original).

A. The Required Degree

The job-offer portion of the Petitioner's labor certification states the minimum educational requirement of the offered position of solutions architect as a bachelor's degree in computer science, computer engineering, information technology (IT), or a related field. Part H.9 of the certification specifies that the Petitioner will not accept "a foreign educational equivalent," indicating a U.S. bachelor's degree as the only acceptable educational credential for the position.

On the labor certification, the Beneficiary attested that, in 2005, an Indian institute granted him a bachelor's degree in IT. The Petitioner submitted a professional, independent evaluation of the Beneficiary's education, stating that his four-year Indian bachelor of engineering degree equates to a U.S. baccalaureate in IT.

The Director issued a request for additional evidence (RFE), noting that part H.9 of the labor certification indicates the Petitioner's exclusion of a foreign baccalaureate degree as an acceptable education credential for the offered position. Part H.9 asks, "Is a foreign educational equivalent acceptable?" and requires an employer to mark a box indicating "Yes" or a box indicating "No." The Petitioner marked the "No" box. The Director therefore asked the company to submit proof that the Beneficiary has a U.S. bachelor's degree in an acceptable field.

In its RFE response, counsel asserted the Petitioner's intent to accept both a U.S. bachelor's degree and a foreign equivalent degree for the position. Counsel described the contrary indication at part H.9 of the labor certification as "a typographical error."

Counsel's assertions, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Petitioners must substantiate counsels' statements in the record with independent evidence, which may include affidavits and declarations.

On appeal, the Petitioner submits additional evidence regarding the claimed typographical error at part H.9 of the labor certification. The company, however, had a reasonable opportunity to provide these materials in response to the Director's RFE. We therefore will not consider the evidence on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider evidence submitted on appeal where, before a denial's issuance, a petitioner received notice of the required proof and a reasonable opportunity to provide it).

Even if the Petitioner demonstrated that it inadvertently checked the wrong box at part H.9 of the labor certification, we would lack authority in these circumstances to amend the error or interpret the document differently. As the Director concluded, USCIS must read and apply "the plain language" of a labor certification. *See Rosedale Linden Park Co. v. Smith*, 595 F. Supp. 839, 834 (D.D.C. 1984). Part H.9 unambiguously indicates the Petitioner's exclusion of a foreign baccalaureate as a qualification for the offered position, and the record lacks evidence of the Beneficiary's possession of a U.S. degree. Also, the Petitioner neither asserted nor proved that DOL audited the labor certification application and acknowledged the claimed, typographical error before certifying the application.

If the Petitioner claimed a typographical error on a USCIS form, we could consider the form's amendment. For example, the USCIS website describes circumstances under which the Agency may change requested immigrant visa categories to correct clerical errors on a Form I-140, Petition for Alien Worker. USCIS, "Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Workers," https://www.uscis.gov/forms/all-forms/petition-filing-and-processing-procedures-for-form-i-140-immigrant-petition-for-alien-workers#Requesting. But the Petitioner claims a typographical error on the ETA Form 9089, Application for Permanent Employment Certification, a DOL form. As previously indicated, Congress authorized DOL - not USCIS - to certify offers of permanent employment to foreign workers. Section 212(a)(5)(A)(i) of the Act. Thus, to amend unambiguous language on a labor certification, the Petitioner must contact DOL. *See Matter of Gen. Elec. Co.*, 2011-PER-01818, *3 (BALCA Apr. 15, 2014) (citation omitted) (dismissing a labor certification appeal for lack of jurisdiction but ruling that DOL has discretion to retroactively amend the contents of an approved labor certification application).

Contrary to clear, unambiguous language on the accompanying labor certification, the Petitioner has not demonstrated the Beneficiary's possession of the minimum educational requirement of the offered position. We will therefore affirm the petition's denial.

B. The Required Employment Experience

Although unaddressed by the Director, the record also does not demonstrate the Beneficiary's qualifying employment experience for the offered position. *See Matter of Wing's Tea House*, 16 I&N Dec. at 160 (requiring a petitioner to demonstrate a beneficiary's possession of all DOL-certified job requirements on a labor certification by a petition's priority date).

The Petitioner's labor certification states that, besides a U.S baccalaureate degree, the offered position of solutions architect requires seven years (or 84 months) of experience in the job offered or as an IT application architect, solution architect, or software developer. The Beneficiary attested that, by the petition's priority date and before the Petitioner began employing him in the offered position, he gained about 85 months of full-time qualifying experience in the United States. He states the following experience:

- About 15 months as an IT application architect with an insurance company, from February 2019 to June 2020;
- About nine months as a solution architect with another insurance company, from July 2018 to February 2019;
- About 11 months as a solution architect for an IT company, from July 2017 to June 2018; and
- About 50 months as a software developer for a software company, from June 2013 to July 2017.

As proof of claimed 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, addresses, and titles, and describe the beneficiary's duties. *Id.* If such letters are unavailable, USCIS will consider other relevant documentation. *Id.*

The Petitioner provided letters regarding all the Beneficiary's claimed qualifying employment. But the letter regarding his experience at the second insurance company from July 2018 to February 2019 does not indicate its issuance by the claimed former employer. Rather, the letter identifies a purported, former co-worker of the Beneficiary as its author. Because the record does not establish the unavailability of a letter from the former employer, we decline to consider the purported former co-worker's document. Also, the record lacks proof that the purported former co-worker worked for the former employer during the relevant period or an explanation of how he knows of the Beneficiary's job duties at that time. Thus, even if we considered the purported former co-worker's letter, it would be unreliable.

Another employment verification letter does not demonstrate the Beneficiary's claimed qualifying experience from February 2019 to June 2020. The employer's name on the letterhead does not match the corresponding name on the labor certification. Neither the letter nor other evidence explains the discrepancy or demonstrates the unavailability of a letter from the former employer. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies).

The Petitioner has not sufficiently established about two years of the Beneficiary's claimed qualifying experience, from July 2018 to June 2020. The record therefore does not establish his possession of

the required seven years of experience. In any future filings in this matter, the Petitioner must therefore submit independent, objective evidence explaining the employer's inconsistent name and demonstrating the Beneficiary's claimed, qualifying experience.

C. The Required Technological Skills

Also unaddressed by the Director, the Petitioner has not demonstrated the Beneficiary's required experience with specified technological skills. Part H.14 of the labor certification, "[s]pecific skills or other requirements," states that the offered position of solutions architect "[r]equires 7 years of experience in the following: Guidewire application; Gosu programming language; Java server-side programming; Git/Jenkins; and SOAP/Restful Web Services."

If a labor certification employer requires experience with technological skills without specifying a duration, any amount of experience with the skills will suffice. *E.g., Matter of Smartzip Analytics*, 2016-PER-00695, *7 (BALCA Nov. 9, 2016) (finding that DOL unreasonably assumed that a position requires a certain duration of experience with special skills where the employer did not affirmatively state so on the labor certification application). But, because the Petitioner specified "7 years of experience" with the designated skills, the company must demonstrate the Beneficiary's possession of seven years' experience with each skill.

All the letters regarding the Beneficiary's claimed prior employment state his experience with the specified skills. None, however, specify how much experience he gained with each skill. The letters therefore do not demonstrate his possession of seven years' experience with each, required skill.

The Director did not notify the Petitioner of this deficiency. Thus, the company must include additional evidence of the Beneficiary's experience with the required technological skills in any future filings in this matter.

III. CONCLUSION

Contrary to the specifications on the accompanying labor certification, the Petitioner has not demonstrated the Beneficiary's possession of the required degree for the offered position. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.