U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-T-N.A. INC.

DATE: APR. 26, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an information technology company, seeks to employ the Beneficiary as a senior technical lead.[1] It requests classification of the Beneficiary as a professional under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner had not established that the Beneficiary possesses the required experience for the proffered job.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary meets the minimum requirements for the proffered position.

Upon *de novo* review, we will withdraw the decision of the Director and remand the matter for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

I. LAW AND ANALYSIS

A. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification), from the U.S. Department of Labor (DOL).[2] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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

[1] The Petitioner filed another Form I-140, Immigrant Petition for Alien Worker, for the Beneficiary on December 22, 2016, in a different employment-based immigrant visa classification. That petition was approved.

[2] The date the labor certification is filed, in cases such as this one, is called the "priority date." *See* 8 C.F.R. § 204.5(d). In this case, the priority date is May 13, 2016. Therefore, the Petitioner must establish that all eligibility requirements for the petition have been satisfied from May 13, 2016, and continuing through the present.

of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file 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 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.

B. Beneficiary's Experience

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. In this case, the labor certification states the minimum requirements for the offered position are a bachelor's degree in electrical engineering or related degree,[3] plus five years of experience in the proffered job or a related occupation. The labor certification also lists the following additional requirements at Part H.14.: "Minimum 4 years experience managing IT projects; 3 years as PRPC Systems Architect; 3 years experience with JAVA/J2EE, IBM WebSphere, Oracle and DB2 PRPC Certified Senior System Architect v5.5 PRPC Certified System Architect v5 Travel and/or relocation to various unanticipated worksites is required."

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
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> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The labor certification lists the following experience for the Beneficiary:

- Full-time employment with the Petitioner as a senior technical lead from November 3, 2014, to May 13, 2016;
- Full-time employment with [redacted] in India, as a senior technical lead from August 12, 2013, to November 2, 2014;
- Full-time employment with [redacted] in India, as an assistant consultant from August 13, 2012, to August 9, 2013;
- Full-time employment with [redacted] in [redacted] Michigan, as an applications engineer from October 1, 2009, to November 22, 2011; and
- Full-time employment with [redacted] in India, as a band T sub band T from August 14, 2006, to October 1, 2009.

[3] The Beneficiary has the required foreign equivalent of a U.S. bachelor of electrical engineering degree.

The Petitioner submitted several experience certificates and letters with the petition and in response to the Director's request for evidence (RFE). In his decision, the Director determined that the certificates and letters were insufficient to establish the Beneficiary's qualifications for the proffered position. On appeal, the Petitioner submits the following additional letters verifying the Beneficiary's experience:

- Letter from [redacted] in India, stating that the Beneficiary was employed as a senior technical lead from August 12, 2013, to November 2, 2014. The letter verifies the Beneficiary's 447 days of qualifying experience, including designing and developing applications as a PRPC systems architect and using the following technologies: JAVA/J2EE, IBM WebSphere, Oracle, and DB2.
- Letter from [redacted] in India, stating that the Beneficiary worked full-time from August 13, 2012, to August 9, 2013, and that his title was assistant consultant when he left the organization. The letter verifies the Beneficiary's 361 days of qualifying experience, including management of IT projects, designing screen flows using PRPC, and using the following technologies: PRPC, JAVA/J2EE, IBM WebSphere, JSP, Oracle, and DB2.
- Letter from [redacted] stating that the Beneficiary was employed as an applications engineer from October 6, 2009, to November 18, 2011.[4] The letter verifies the Beneficiary's 773 days of qualifying experience, including designing and developing applications using PRPC, JAVA/J2EE, IBM WebSphere, and DB2.
- Letter dated November 23, 2016, from [redacted] (formerly [redacted] in India, stating that the Beneficiary was employed full-time as a module lead[5] from August 14, 2006, to October 1, 2009. The letter verifies the Beneficiary's 1144 days of qualifying experience, including management of IT projects, designing screen flows using PRPC, and using the following technologies: PRPC, JAVA/J2EE, EJB, IBM WebSphere Application Server, Oracle, and DB2.
- Letter from [redacted] in India stating that the Beneficiary was employed full-time as a software engineer-IT from February 1, 2001, to February 1, 2004. However, the Beneficiary's employment with [redacted] was not listed on the labor certification.[6] Therefore, we decline to accept the letter as verification of the Beneficiary's experience.

The evidence submitted with the petition, in response to the RFE, and on appeal establishes that the Beneficiary possesses the required experience for the proffered job. We will therefore withdraw the decision of the Director and remand the matter for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

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[4] The letter verifies nine less days of employment than that listed on the labor certification, so we have credited only the days verified in the letter.

[5] The Petitioner states on appeal that the position title of module lead at [redacted] aligns with the position of "Band-T-1" when the company was operating as [redacted] The job duties listed on the labor certification for [redacted] and in the letter from [redacted] are similar.

[6] The Beneficiary's experience, without such fact certified by the DOL on the labor certification, lessens the credibility of the evidence and facts asserted. *Matter of Leung*, 16 I&N Dec. 12, 14-15 (Dist. Dir. 1976).

C. Ability to Pay the Proffered Wage

Although not addressed by the Director, the record does not establish that the Petitioner has the continuing ability to pay the proffered wage from the priority date. The proffered wage is $130,000 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In this case, the record does not contain an annual report, federal tax return, or audited financial statements for the Petitioner for 2016 as required by 8 C.F.R. § 204.5(g)(2).[7] Although the 2016 audited financial statements or tax return would not been available at the time of filing, on remand, the Director should request regulatory-required evidence of the Petitioner's continuing ability to pay the proffered wage in 2016.

II. CONCLUSION

The decision of the Director regarding the Beneficiary's experience will be withdrawn. The matter is remanded to the Director for consideration of the Petitioner's ability to pay the proffered wage in 2016. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

[7] The record contains the Petitioner's federal tax return for 2015 and paystubs for the Beneficiary indicating that he had received wages of $77,420.06 year-to-date from the Petitioner as of July 31, 2016.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of I-T-N.A. Inc.*, ID# 445077 (AAO Apr. 26, 2017)