U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-S-S-, INC.

DATE: APR. 27, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of information technology services, seeks to employ the Beneficiary as a senior programmer analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This "EB-2" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status if he or she has a master's degree, or a bachelor's degree followed by five years of experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the record did not establish that the Beneficiary has the educational credentials required for the offered position and the requested classification.

On appeal, the Petitioner asserts that the Director erred in rejecting the Beneficiary's post graduate diploma as the foreign equivalent of a U.S. baccalaureate.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer files a labor certification application with 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). DOL must certify that the United States lacks enough able, willing, qualified, and available workers for an offered position, and that a foreign national's permanent employment in the position will not harm the wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i)(I)-(II) of the Act. If DOL approves the labor certification, the employer then submits an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS

[1] In cases like this one, the filing date of a labor certification application is the "priority date." As of that date, a beneficiary must meet the job requirements of an offered position stated on a labor certification. Thus, the Beneficiary here must have had a bachelor's degree followed by five years of experience by the date of the labor certification's filing.

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.

For an advanced degree professional position, a labor certification must state that the job requires an advanced degree or its equivalent. *See* 8 C.F.R. § 204.5(k)(4)(i). In pertinent part, Department of Homeland Security regulations define the term "advanced degree" as "any 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." 8 C.F.R. § 204.5(k)(2) (emphasis added). Thus, to qualify as an advanced degree professional, a beneficiary with at least five years of experience must also possess a prior U.S. bachelor's degree or its foreign equivalent. 8 C.F.R. § 204.5(k)(3).

II. ANALYSIS

A. The Beneficiary's Educational Credentials

The labor certification states the minimum requirements of the offered position of senior programmer analyst as a U.S. bachelor's degree or a foreign equivalent degree in computer science, electronic engineering, or a related field, plus 60 months of experience in the job offered or a related occupation. The labor certification states that no alternate combination of education and experience is acceptable.

The Beneficiary attested on the labor certification to his completion of a post graduate diploma in computer applications from [redacted] in India. The record contains copies of a post graduate diploma and a statement of marks from the university, indicating the Beneficiary was awarded a post graduate diploma in computer applications on October 13, 2009. The record also contains copies of a diploma and a consolidated memorandum of marks from [redacted] in India. The documents indicate the Beneficiary's award of a three-year bachelor of commerce degree on February 1, 2007.

The Petitioner submitted reports from three experts, all concluding that the Beneficiary's post graduate diploma equates to a U.S. bachelor of science degree in computer information systems. The Petitioner also submitted a report from the Electronic Database of Global Education (EDGE), an online resource that federal courts have found to provide reliable, peer-reviewed information about foreign educational equivalencies.[2] Like the Petitioner's experts, EDGE reports that, if following a

[2] EDGE was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), "a nonprofit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in over 40 countries." AACRAO, at http://www4.aacrao.org/centennial/about.htm (last visited Apr. 11, 2017); *see also, e.g., Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (describing EDGE as "a respected source of information").

three-year bachelor's degree, an Indian post graduate diploma favorably compares to a U.S. bachelor's degree.

The Director, however, concluded that the record did not establish the Beneficiary's possession of the equivalent of a U.S. bachelor's degree. *See Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (allowing the immigration service to discount expert testimony that conflicts with other evidence or "is in any way questionable"). Noting that U.S. baccalaureate degrees generally require four years of college or university studies, the Director found that neither the Beneficiary's three-year bachelor's degree nor his one-year post graduate diploma independently equated to a U.S. bachelor's degree. Rather, the Director found that, contrary to the criteria for the offered position and the requested classification, the Petitioner's experts relied on a combination of the Beneficiary's bachelor's degree and post graduate diploma to reach their conclusions.

We agree that the offered position and the requested classification require the Beneficiary to possess at least a U.S. bachelor's degree or a single, foreign credential that equates to one. The Act and its legislative history indicate that an advanced degree professional must possess at least a bachelor's degree without combining lesser educational credentials, and without combining education with experience. Responding to complaints that the employment-based immigration regulations bar substitution of experience for education, the former Immigration and Naturalization Service (INS) found that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor's degree." Final Rule for Employment-Based Immigrants, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991).

Contrary to the Director's conclusion, however, we find that the record establishes the Beneficiary's post graduate diploma as the single equivalent of a U.S. bachelor's degree. Although admission to the post graduate program required a three-year baccalaureate degree, the Petitioner's experts do not combine two lesser educational credentials to reach a baccalaureate equivalency. Rather, the post graduate diploma itself equates to a U.S. bachelor's degree.

The Director also found that the Beneficiary's baccalaureate studies did not include computer-related courses. Contrary to the findings of the Petitioner's experts, the Director therefore concluded that the record did not support the Beneficiary's post graduate ability to complete advanced classes in computer information systems. The record, however, contains a copy of a memorandum of marks stating the Beneficiary's passage of multiple computer-related courses in his baccalaureate program. The courses include: business data processing through [redacted] fundamentals of computer applications and office automation; fundamentals of computer applications; and "computer practicals." Thus, the record supports the Beneficiary's ability to complete advanced, post graduate courses in computer information systems.

A preponderance of the evidence establishes the Beneficiary's post graduate diploma as the equivalent of a U.S. bachelor's degree. The Beneficiary therefore meets the educational

requirements of the offered position and the requested classification. We will therefore withdraw the Director's decision.

B. The Beneficiary's Experience

Although the Beneficiary meets the educational requirements of the offered position and the requested classification, the record does not establish his possession of the required five years of post-baccalaureate experience.

As previously discussed, the record establishes the Beneficiary's possession of the equivalent of a U.S. bachelor's degree since October 13, 2009, when he earned the post graduate diploma. Pursuant to the requirements of the labor certification and the requested classification, the Petitioner must establish the Beneficiary's possession of at least 5 years, or 60 months, of qualifying experience after October 13, 2009.

The Beneficiary attested on the labor certification to his possession of the following experience prior to September 1, 2015, when he began working for the Petitioner in the offered position.[3]

- Senior system analyst for [redacted] in the United States from November 5, 2013, to August 31, 2015; and
- Assistant systems consultant for [redacted] in India from September 1, 2005, to October 15, 2013.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(g)(1). The letters must provide the names, addresses, and titles of the employers, and descriptions of a beneficiary's experience. *Id.*

The Petitioner submitted a letter from a senior information technology manager on the stationery of [redacted] Consistent with the information on the labor certification, the letter states the Beneficiary's duties and confirms the company's full-time employment of the Beneficiary as an assistant systems consultant from September 1, 2005, to October 15, 2013.

The [redacted] letter, however, does not establish the Beneficiary's possession of five years of post-baccalaureate experience as required for the offered position and the requested classification. As noted, only experience gained after the Beneficiary was awarded his post graduate diploma on October 13, 2009, may be counted as post-baccalaureate experience. As such, the letter only documents about four years of qualifying post-baccalaureate experience. The record lacks additional employer letters from [redacted] or any other employer establishing the Beneficiary's possession of the required amount of post-baccalaureate, qualifying experience.

[3] A labor certification employer generally cannot rely on experience that a foreign national gained with it in an offered position. 20 C.F.R. § 656.17(3).

Therefore, the record does not establish the Beneficiary's possession of at least five years of post-baccalaureate, qualifying experience as required for the offered position and the requested classification. Because the Director's decision did not address this issue, we will remand the matter to the Director for further proceedings.

C. The Petitioner's Ability to Pay the Proffered Wage

Also unaddressed by the Director, the record does not establish the Petitioner's ability to pay the proffered wage. 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 include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In this case, the labor certification states the proffered wage of the offered position of senior programmer analyst as $104,437 a year. The petition's priority date is September 18, 2015.

The record contains a copy of the Petitioner's federal income tax returns for 2014. But the record lacks required evidence of the Petitioner's ability to pay the proffered wage in 2015, the year of the petition's priority date. Contrary to 8 C.F.R. § 204.5(g)(2), the record therefore does not establish the Petitioner's ability to pay.

Also, USCIS records indicate the Petitioner's filing of multiple employment-based immigrant petitions. After this petition's priority date of September 18, 2015, the records indicate the Petitioner's filing of at least 40 other petitions.[4]

As previously indicated, a petitioner must demonstrate its continuing ability to pay the proffered wage of a petition from its priority date onward. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of all the petitions it filed from this petition's priority date until the other beneficiaries obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *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 beneficiaries). Otherwise, if the Petitioner's annual amounts of net income or net current assets meet or exceed the proffered wage of each petition, the company could unrealistically demonstrate its ability to pay an unlimited number of

[4] USCIS records identify the 40 other petitions by the following receipt numbers: [redacted] and [redacted].

beneficiaries. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977) (holding that the ability-to-pay requirement establishes a job offer as "realistic").

In this case, the record does not document the proffered wages of the petitions the Petitioner filed after September 18, 2015, or whether the Petitioner paid wages to their beneficiaries after that date. The record also does not indicate whether the other petitions were denied, withdrawn, or revoked, or whether their beneficiaries obtained lawful permanent residence. The record therefore does not establish the Petitioner's ability to pay the combined proffered wages of all its applicable beneficiaries.

For the foregoing reasons, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. For this additional reason, we will remand the matter to the Director for further proceedings.

III. CONCLUSION

The record establishes the Beneficiary's possession of the minimum educational requirements for the offered position and the requested classification. But the record does not establish the Beneficiary's possession of the required experience or the Petitioner's ability to pay the proffered wage. On remand, the Director should notify the Petitioner of the evidentiary defects regarding its ability to pay the proffered wage and the Beneficiary's experience. The Director should also inform the Petitioner of any other issues and provide it a reasonable opportunity to respond.

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 P-S-S-, Inc.*, ID# 41076 (AAO Apr. 27, 2017)