U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-R-E-S-, LLC

DATE: APR. 27, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a real estate data and software provider, seeks to employ the Beneficiary as a senior software engineer. 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. § 1152(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 visa petition, concluding that the record did not establish that the Beneficiary had the qualifying experience required by the labor certification. The Director also denied the Petitioner's subsequent motion to reopen as he found it did not meet the regulatory requirements for a motion. The Petitioner appealed the Director's decision to this office. We dismissed the appeal, affirming the Director's finding that the record did not establish that the Beneficiary had the experience required by the labor certification.

On motion to reopen, the Petitioner submits new evidence in support of its claim that the Beneficiary acquired the necessary qualifying experience with his previous employers.

Upon review, we will deny the motion to reopen.

I. LAW

A. Employment-Based Immigration

Employment-based immigration is generally 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.[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. *See*

[1] The priority date of a petition is the date that the DOL accepts the labor certification for processing. *See* 8 C.F.R. § 204.5(d). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence.

section 212(a)(5)(A)(i)(I) of the Act. The DOL also certifies that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(II) of the Act. Next, 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. Finally, if USCIS approves the immigrant visa petition, the foreign national must 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. Motion to Reopen

A motion to reopen is based on documentary evidence of *new facts*. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

A. Beneficiary Eligibility

To establish that a beneficiary is qualified to perform the duties of an offered position, a petitioner must demonstrate that the beneficiary has met all of the requirements set forth in the labor certification as of the priority date of the petition, which in this case is July 23, 2014. In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements.[2]

In the present matter the labor certification requires the Beneficiary to have a U.S. bachelor's or foreign equivalent degree in computer science, information technology, or a related field, and 60 months of experience in the offered position of senior software engineer. On appeal, we found the Beneficiary's four-year bachelor of engineering degree from the (India) to satisfy the educational requirements of the labor certification, but dismissed the appeal because neither the Beneficiary's experience with the Petitioner as a senior software engineer nor his previous employment provided him with the required 60 months of experience.

On motion, the Petitioner does not renew its claim that its employment of the Beneficiary qualifies him for the offered position. Instead, it seeks solely to establish that the Beneficiary acquired the 60 months of qualifying experience while working for his previous employers and submits what it describes as updated reference letters in support of this claim, including: a statement from the director of a statement from the human resources manager of and a statement from the senior vice president for operations at For the reasons that follow, we do not find this evidence to support the Petitioner's claim.

[2] *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

First, the employment experience reflected in the newly submitted letters does not total the 60 months required by the labor certification. The letter from the director of states that his company employed the Beneficiary from March 7, 2005, until June 10, 2006, a period of 15 months and 3 days. The statement from the human resources manager of reflects the dates of the Beneficiary's employment as June 12, 2006, to July 14, 2009, a period of 37 months and 2 days. The statement from the senior vice president for operations at indicates that the Beneficiary worked for his firm from July 28, 2009, until October 16, 2009, a period of 2 months and 18 days. These periods of employment, which do not differ from those claimed by the Petitioner on appeal, total 54 months and 23 days, and, therefore, do not demonstrate that the Beneficiary has the 60 months of experience claimed by the Petitioner on motion.

We also do not find the record to establish the experience reported by these letters, even if it totaled 60 months, to be qualifying employment. The statement from the Petitioner's general counsel, submitted in response to the Director's request for evidence (RFE), indicates that he finds the Beneficiary's prior employment at to provide him with 37 months of qualifying experience. Although the general counsel also notes the Beneficiary's employment with and he makes no similar claim with regard to the experience the Beneficiary gained with these businesses as being qualifying employment. We further observe that in his statement, the director of does not state that the Beneficiary was employed throughout his employment with the company as a software programmer, only that he was working as one at the time he left.[3] The human resources manager at makes a similar clarification regarding her company's employment of the Beneficiary. In her letter, she states only that he was employed as a software engineer at the time he left, raising questions regarding the Petitioner's claim that all 37 months of the Beneficiary's employment at was in the offered position. Accordingly, the letters submitted on motion do not establish that, as claimed by the Petitioner, all of the Beneficiary's employment with his previous employers is qualifying experience.

Finally, we question whether the experience statements that the Petitioner has submitted on motion are genuine. The three new letters and statements bear the same dates and signatures as the experience letters provided by the Petitioner in response to the RFE. However, unlike the previous submissions, the letters submitted on motion list the duties performed by the Beneficiary, raising questions as to why they were not provided in response to the RFE, which specifically asked the Petitioner for experience letters describing the Beneficiary's duties. More questions are created by the differences we have noted in the letters submitted on motion and those provided in response to the request for evidence, differences that are difficult to understand in letters signed by the same individual and dated the same day. These anomalies include the differing sizes of the business logos that appear on these letters, the differing type fonts, and the shifting positions of letterhead elements. Finally, the signatures on all three of the letters submitted on motion do not appear to be original, but to be copies of the signatures found on the experience letters previously submitted by the Petitioner. Therefore, even if the letters submitted by the Petitioner on motion reflected 60 months of qualifying

[3] We note that another letter from the director at submitted at the time of filing and in response to the Director's RFE indicates that his company employed the Beneficiary as a trainee programmer from March 7, 2005, until May 31, 2005, and as a software programmer from June 1, 2005, until June 10, 2006.

employment, we would not find them to establish the Beneficiary's qualifications for the offered position.

For the reasons discussed, the reference letters submitted by the Petitioner do not overcome our decision on appeal that the record does not establish the Beneficiary's qualifications for the offered position. Therefore, we will deny the motion to reopen and affirm the dismissal of the appeal.

B. Ability to Pay

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 must establish that its job offer to a beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the labor certification, a petitioner must establish that the job offer was realistic as of the priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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 a petitioner to demonstrate financial resources sufficient to pay a beneficiary's proffered wage, 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 the present case, the priority date of the visa petition is July 23, 2014, and the proffered wage is $116,000 per year. Therefore, the Petitioner must demonstrate its ability to pay the Beneficiary the annual wage of $116,000 from July 23, 2014, onward.

In our dismissal of the appeal, we informed the Petitioner that the record did not contain the evidence necessary to establish its ability to pay the proffered wage and that "in any future filings in this matter, [it] must submit copies of annual reports, federal tax returns, or audited financial statements from 2014 onward pursuant to 8 C.F.R. § 204.5(g)(2)." On motion, the Petitioner submits only an audited financial statement for 2014 and does not indicate that its 2015 statement is unavailable or that it cannot provide one of the other types of financial evidence required by regulation. In the absence of this evidence, we cannot find that the Petitioner has the ability to pay. For this reason as well, the visa petition cannot be approved.

III. CONCLUSION

We previously dismissed the Petitioner's appeal, finding that the record did not establish that the Beneficiary had the experience required by the labor certification. On a motion to reopen, the Petitioner has not overcome our prior finding. The Petitioner has also not established its ability to pay the Beneficiary the proffered wage from the priority date onward.

ORDER: The motion to reopen is denied.

Matter of V-R-E-S-, LLC, ID# 267056 (AAO Apr. 27, 2017)