U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-T-, INC.

DATE: AUG. 4, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a software consulting business, seeks to employ the Beneficiary as a middleware/network administrator. 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 labor certification does not support the requested professional classification.

On appeal, the Petitioner submits a brief and asserts that the Beneficiary meets the minimum requirements for the proffered position and the requested classification.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *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 of domestic workers similarly employed. 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.

II. ANALYSIS

A. Labor Certification Does Not Support Requested Classification

For professional classification, the Petitioner must establish that the job offer portion of the labor certification requires at least a bachelor's degree or a foreign equivalent degree. 8 C.F.R. § 204.5(l)(3)(i). In this case, the labor certification states that the offered position of Middleware/Network Administrator has the following minimum requirements:

H.4.	Education: None
H.5.	Training: None required.
H.6.	Experience in the job offered: 48 months required.
H.7.	Alternate field of study: None accepted.
H.8.	Alternate combination of education and experience: bachelor's degree and two years of experience.
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in an alternate occupation: Accepted.
H.10-B	Job title of Acceptable Alternate Occupation: Network, Systems, or UNIX Administrator or combination
H.14.	Specific skills or other requirements: DNS, LDAP. FTP, Remote Access, Security Management and System Troubleshooting skills. Installed and Configured Load Balancer to remove SPOF on WebServers using XML Config tool. WSAdmin, Shell, JACL and Jython scripting. Worksite may be in temporary unanticipated locations. Travel/relocation may be required.

The terms of the labor certification allow an applicant to qualify for the job with less than a U.S. bachelor's degree or a foreign equivalent degree. Specifically, Parts H.4 and 6 permit an applicant to qualify for the proffered job with four years of experience in lieu of a bachelor's degree. Because the labor certification does not require at least a U.S. bachelor's degree or a foreign equivalent degree, the petition cannot be approved under the professional classification. *See* 8 C.F.R. § 204.5(l)(3)(i) (the labor certification underlying a petition for a professional must require at least a U.S. bachelor's degree or a foreign equivalent degree).

On appeal, the Petitioner asserts that "there is no provision that precludes a 'professional' from qualifying for 'skilled worker' under 203(b)(3)(A)(i) of the Act if a comparable level of experience, without a degree, would make them eligible for the occupation."[1] However, at Part 2. of the Form I-140, the Petitioner selected 1.e. indicating that it was filing the petition under the professional

[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

classification. There is no provision in statute or regulation that allows USCIS to readjudicate a petition under a different visa classification once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Further, on appeal, the Petitioner asserts that the "Dictionary of Occupational Titles has established that a Bachelor degree is equivalent to 2 years for SVP purposes" and that because of this, "both categories have SVP level time of 7- 'Over 2 years up to and including 4 years.'" Thus, the Petitioner asserts that the alternative requirements are equivalent. Specific vocational preparation (SVP) is a component of the occupational classification, and is defined in the Dictionary of Occupational Titles (DOT) as "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation."[2] DOL has determined that a bachelor's degree is equivalent to two years of experience for purposes of determining lapsed years.[3] However, the SVP determination does not indicate that a bachelor's degree is required for any particular job, nor does it speak to the actual minimum requirements of the proffered position in this case. A labor certification underlying a petition for a professional must require at least a U.S. bachelor's degree or a foreign equivalent degree. *See* 8 C.F.R. § 204.5(l)(3)(i). Experience cannot serve as a substitute for a U.S. bachelor's degree or a foreign equivalent degree in the professional classification.

The evidence submitted does not establish that the offered position requires at least a U.S. bachelor's degree or a foreign equivalent degree. As such, the labor certification does not support the requested professional classification and, therefore, the petition cannot be approved under the professional classification.

B. Beneficiary Does Not Meet the Terms of the Labor Certification

Beyond the Director's decision, the record does not demonstrate that the Beneficiary meets the terms of the labor certification. A petitioner must establish that a beneficiary meets all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Although the record establishes that the Beneficiary has the education to meet the alternate requirements of the labor certification, the record does not establish that the Beneficiary has the required minimum of two years of experience.

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[2] *Dictionary of Occupational Titles*, Appendix C (4th rev. ed. 1991), https://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM (last visited July 20, 2017). The DOT has been replaced by O*NET as the occupational classification system used by DOL.

[3] Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, Final Rule, 69 Fed. Reg. 77326, 77332 (Dec. 27, 2004).

On the labor certification, the Petitioner claims that more than two years of the Beneficiary's qualifying prior employment experience was with [redacted] in [redacted] New Jersey, where he worked as a middleware/network administrator from December 1, 2010, to April 13, 2011, and as a websphere administrator from September 14, 2011, to March 8, 2013. The Beneficiary lists this same information on his resume. Per 8 C.F.R. § 204.5(l)(3), the Petitioner must submit evidence that the Beneficiary has the claimed experience. Such evidence must include the name, address, and title of the employer, along with a description of the experience gained. *Id.*

Here, the record contains a letter from the president of [redacted] who asserted that the Beneficiary was employed at [redacted] as a websphere administrator from December 2010 to March 2013. This information is not consistent with the Beneficiary's attestation on the labor certification that he last worked at [redacted] as a websphere administrator from September 2011 to March 2013. Moreover, the letter did not state that the Beneficiary worked for [redacted] as a middleware/network administrator during any period, nor did he discuss the gap in the Beneficiary's employment from April 2011 to September 2011, even though the Beneficiary made both of these claims on the labor certification. Based on these inconsistencies, the letter does not establish the Beneficiary gained any qualifying experience at [redacted] from December 2010 to March 2013. A petitioner must resolve inconsistencies in the record such as this with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner did not submit letters from the Beneficiary's other claimed employers to establish that he has qualifying experience. As such, the record does not demonstrate the Beneficiary's possession of the required experience.

Furthermore, the record does not contain evidence that the Beneficiary has the "specific skills" required by the labor certification at Part H.14. The Petitioner listed the following required specific skills:

> DNS, LDAP, FTP, Remote Access, Security Management and System Troubleshooting skills. Installed and Configured Load Balancer to remove SPOF on WebServers using XML Config tool. Wsadmin, Shell, JACL and Jython scripting . . . .

Although the Beneficiary claimed to have these skills on his resume, independent evidence of his specific skills consists of a letter from [redacted] which includes the following description of the Beneficiary's responsibilities:

- Installed, configured, and maintained Web Sphere Application Service 7.0, Web sphere MQ5x,Deployment Manager and Application Service Profiles
- Monitoring application log files, Application Service Performance, Servlet Status, Active Sessions and DB Pool connections
- Monitoring of space availability on each file system using the Shell Scripts
- Setup various user profiles, environment variables, security to ensure smooth operation

As a Web Sphere Admin, [the Beneficiary] worked with software tools and environments such as: Tools used MS Office, Java, Visual café, JProbe, Log Analyzer and environment worked in UNIX & Linux.

The [redacted] letter does not indicate that the Beneficiary's responsibilities at [redacted] included or were otherwise the equivalent of the special skills required by the Petitioner on the labor certification. There is no other independent evidence, such as letters from the Beneficiary's prior employers or training certificates, to demonstrate that he has the special skills required by the Petitioner for the proffered position.

Consequently, the Petitioner's evidence is not sufficient to establish that the Beneficiary has the qualifying experience or special skills required by the terms of the labor certification.

C. Ability to Pay the Proffered Wage

As an additional matter, we note that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date. A petitioner must establish that it has the ability to pay the beneficiary the proffered wage, as stated on the labor certification, from the priority date onward through the submission of annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2).

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).

The proffered wage is $106,000 per year, and the priority date is November 25, 2013. The record contains the Petitioner's 2014 IRS Form 1120, U.S. Corporation Income Tax Return, together with IRS Form W-2, Wage and Tax Statement, issued by the Petitioner to the Beneficiary in 2014 showing it paid him $76,981.27 in yearly wages. The record also contains several paychecks issued by the Petitioner to the Beneficiary in 2015.[4] However, the record does not contain the Petitioner's annual reports, federal tax returns, or audited financial statements for 2013 and 2015, as required by 8 C.F.R. § 204.5(g)(2). If the Petitioner pursues this matter further, it must submit regulatory-prescribed evidence of its ability to pay the proffered wage from 2013 onward.

III. CONCLUSION

The Petitioner has not established that the labor certification supports the requested professional classification, or that the Beneficiary met the minimum experience and special skills requirements for the proffered position. Further, the Petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date onward.

[4] As of September 29, 2015, the Petitioner had paid the Beneficiary year-to-date wages of $36,222.40.

ORDER: The appeal is dismissed.

Cite as *Matter of J-T-, Inc.*, ID# 591809 (AAO Aug. 4, 2017)