U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-, INC.

DATE: AUG. 19, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a hospitality operations company, seeks to employ the Beneficiary as a computer systems analyst. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. 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 Texas Service Center denied the petition, concluding that the record did not establish, as required, that the position is eligible for the professional classification. The Director also determined that the record did not establish that the Beneficiary met the minimum requirements stated on the labor certification. Specifically, he found that the Beneficiary's degrees were not sufficiently related to the majors listed on the labor certification, and that the experience letters submitted by the Petitioner did not establish that the Beneficiary had the specific experience required by the labor certification.

On appeal, the Petitioner submits additional evidence and asserts that its professional classification request for the petition was in error. It states that it "intended to file a skilled worker petition, that the position satisfies the requirements of a skilled worker, and that the beneficiary satisfies the requirements of a skilled worker."

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

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved 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 and that employing a foreign national in the position will not adversely affect the wages and working

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is February 12, 2013. *See* 8 C.F.R. § 204.5(d).

conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files 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 applies 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. THE VISA CLASSIFICATION

At Part 2 of the Form I-140, Immigrant Petition for Alien Worker, the Petitioner checked the box at 1.e. requesting classification as a professional. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

In addition, the job offer portion of the labor certification underlying a petition for a professional "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i).

Here, the labor certification requires, in pertinent part, a "[b]achelor's degree or equiv. combo of edu., training, and exp" in computer science, management information systems, or a related field. In a request for evidence (RFE), the Director stated that the professional classification does not permit combinations of education, training, and experience, and he asked for additional evidence that the offered position is professional and that the minimum requirement for entry into the occupation is a bachelor's degree.[2]

In its RFE response, the Petitioner requested to change the visa classification. The Petitioner submitted a new page 1 of Form I-140 requesting the Beneficiary's classification under the third-preference category as a skilled worker, which requires only two years of training or experience. *See* section 203(b)(3)(A)(i) of the Act. It asserted that it "[e]rroneously" marked the wrong box when it initially submitted the petition and claimed that the Beneficiary is eligible under the skilled worker classification. In his denial decision, the Director declined the Petitioner's request to change the classification from professional to skilled worker.

A petitioner must establish eligibility as of a petition's filing and throughout its adjudication. 8 C.F.R. § 103.2(b)(l). A petitioner "may not make material changes to a petition that has already been filed in

[2] The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) and section 203(b)(3)(A)(ii) of the Act use a singular description of the degree required for classification as a professional. In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. *See also Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008)(for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree).

an effort to make an apparently deficient petition conform to [USCIS] requirements." *Matter of Izummi,* 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). Before the issuance of a decision, however, a petitioner may request correction of a visa classification resulting from a clerical error. USCIS' website, however, cautions petitioners who seek to change visa classifications. It states: "Although you may request that we change the visa classification to correct a clerical error in Part 2 of the form, we will make the final determination about whether to change the visa classification based on everything in your case." *Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker*, https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker (last visited July 24, 2019).

The website also advises petitioners to check their Form I-140 receipt notices to ensure that the notices state correct visa categories and, if not, to call USCIS "immediately." *Id.* The website therefore indicates that USCIS reserves a visa classification change only for a petitioner who inadvertently checked the wrong box in Part 2 of its Form 1-140. The policy does not allow a petitioner multiple attempts, through a single petition, to obtain approvals in various visa categories.

On appeal, the Petitioner asserts that its professional classification request for the Beneficiary was in error and that it "intended to file a skilled worker petition, that the position satisfies the requirements of a skilled worker, and that the beneficiary satisfies the requirements of a skilled worker."

Here, the record does not establish that the professional classification request was a clerical error. With the petition, the Petitioner submitted a letter stating that the Beneficiary "is ideally suited to continue to serve in the professional occupation position" of computer systems analyst, thus indicating its intent to seek the professional classification. However, in its response to the RFE and on appeal, it states that the request was in error. It did not detail the circumstances of the error, nor did it submit corroborating evidence of the nature of the error. Also, the timing of the Petitioner's classification-change request suggests the Petitioner's initial intention to seek professional designation. Contrary to USCIS' website information, the Petitioner did not notify USCIS of the error "immediately" after the issuance of the petition's receipt notice. Rather, the Petitioner notified USCIS after the RFE questioned the Beneficiary's eligibility for the professional classification.

Thus, the Petitioner's delay in notifying USCIS of the error and its purported nature, together with the Petitioner's apparent initial intent to seek professional classification, cast doubts on its claims.

The Petitioner has not demonstrated that the Director erred in denying its request to change visa classification. We therefore consider the petition to request professional classification. The Petitioner does not dispute the Director's findings that the offered position is not professional; and that the minimum requirement for entry into the occupation is less than a bachelor's degree, as an applicant may qualify for the offered job with less than a U.S. bachelor's degree or foreign equivalent. Therefore, the petition must be denied.

III. THE BENEFICIARY'S QUALIFICATIONS

The Director also determined that the Beneficiary does not meet the minimum requirements for the offered job. A beneficiary must meet 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)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

Section H of the labor certification states that the offered position of computer systems analyst requires a bachelor's degree in computer science, management information systems, or related field, or "equiv. combo of edu., training, and exp." It also requires 24 months of experience in the job offered or in application and systems development operations. Part H.8. states that no alternate combination of education and experience that is acceptable, and Part H.9. permits a foreign educational equivalent. Part H.14. states the following specific skills or other requirements:

> U.S. Bachelor's Degree or its equivalent combination of education, training, and experience, in Computer Science, Management Information Systems or related field and two years of experience as Software Engineer including two years of experience developing applications/systems related to billing and payrolls sampling techniques, cost accounting, mathematical modeling, maintaining payroll systems and building commercial software applications. Any suitable combination of education, training, and experience will be acceptable.

Regarding the Beneficiary's experience, the labor certification states that the Beneficiary worked as a computer systems analyst with the Petitioner from May 14, 2012, to the date the labor certification was filed on February 12, 2013; as a computer systems analyst with [redacted] from August 18, 2009, to May 14, 2012; and as a software programmer with [redacted] from June 1, 2002, to December 1, 2007. The Director stated that the letters submitted relating to the Beneficiary's experience do not confirm the Beneficiary's qualifying two years of experience.[3] Upon review of the record, we agree.

The letter from [redacted] confirms the Beneficiary's experience as a "Computer Analyst" from August 2009 to April 2012. However, the job title of computer analyst in the letter does not match the title of computer systems analyst listed on the labor certification; and the dates of employment listed in the letter do not match the dates listed on the labor certification. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the letter from [redacted]. confirms the Beneficiary's experience as a software engineer from June 18, 2002, to December 31, 2007. However, the letter does not list the title of the writer as required by 8 C.F.R. § 204.5(l)(3); the job title of software engineer in the letter does not match the title of software programmer listed on the labor certification; and the dates of employment listed in the letter do not match the dates listed on the labor certification. *See Matter of Ho*, 19 I&N Dec. at 591-92.

The Petitioner submits no new evidence on appeal regarding the Beneficiary's experience. Thus, based on the deficiencies in the letters described above, the Petitioner has not established by a

[3] Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(l)(3).

preponderance of the evidence that the Beneficiary possessed the minimum experience required by the labor certification as of the priority date.

The Director also determined that the Beneficiary did not have the education required by the terms of the labor certification. However, because the issues relating to ineligibility for the professional classification and the Beneficiary's experience are dispositive in this case, we need not reach the issue of the Beneficiary's education and therefore reserve it.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of Y-, Inc.*, ID# 5600462 (AAO Aug. 19, 2019)