U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-I-, INC.

DATE: DEC. 5, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a distributor and importer of natural stones, seeks to employ the Beneficiary as an accountant. It requests his classification as a skilled worker under the third-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish the Beneficiary's possession of the minimum education required for the offered position. Specifically, the Director found that the Beneficiary's educational credentials did not equate to a bachelor's degree.

On appeal, the Petitioner asserts that, based on a combination of education and experience, the Beneficiary meets the position's educational requirement.

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

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

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). *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 able, willing, qualified, and available workers for an offered position, and that employment of a foreign national will not hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If DOL certifies an offered position, the employer must next file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. In visa petition proceedings, USCIS, among other things, determines whether a beneficiary meets the DOL-certified job requirements of an offered position. Finally, if USCIS approves a 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. THE MINIMUM EDUCATIONAL REQUIREMENTS

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. USCIS may neither ignore a term of a labor certification, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the content of the labor certification").

Here, the accompanying labor certification states both primary and alternate requirements for the offered position of accountant. The primary requirements include a U.S. bachelor's degree, or a foreign equivalent degree, in accounting or a related field of study, plus one year of experience in the job offered or in a "related Accounting occupation."[2] The Petitioner, however, seeks to qualify the Beneficiary for the offered position based on the alternate requirements of a "Bachelor degree equivalent as determined by [an] Accredited Credentials Eval[uator]" and one year of experience.

On the labor certification, the Beneficiary attested to his completion of a bachelor's degree in accounting at an Indian university in 1992. The Petitioner submitted copies of a diploma and marks statements indicating that, after three years of study, the university awarded the Beneficiary a bachelor of commerce degree in 1992. The Petitioner also submitted an evaluator's report that combined the Beneficiary's degree with three years of his accounting-related experience to conclude that he has the equivalent of a U.S. bachelor's degree in accounting.

The Director found that the labor certification required a bachelor's degree and that the Beneficiary did not have such a degree. However, the plain language of the labor certification is ambiguous as to whether a combination of education and experience meets the position's alternate educational requirement. Instructed on the labor certification to "indicate the alternate level of education required," the Petitioner stated a "Bachelor degree equivalent as determined by Accredited Credentials Eval[uator]." Because the Petitioner was asked to provide the alternate level of "education," however, the Petitioner's response indicates its acceptance of the equivalent of a bachelor's degree based on a combination of only *educational* credentials. The Petitioner's response in this part does not specify its acceptance of a bachelor's equivalent based on a combination of education and experience.

On the other hand, in the labor certification's section for "specific skills or other requirements," the Petitioner stated: "The employer will accept any suitable combination of education, training or experience consistent with [the position's requirements stated elsewhere on the labor certification]."

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[1] In this case, the petition's priority date is January 16, 2014, the date the DOL received the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] For skilled worker classification purposes, relevant college or university studies may qualify as training. *See* 8 C.F.R. § 204.5(l)(2) (defining the term "skilled worker").

The Petitioner's statement is similar to the "*Kellogg* language" that DOL regulations require labor certification applications to state if a foreign national already works for the employer and qualifies for an offered position based on alternate experience requirements. *See* 20 C.F.R. § 656.17(h)(4)(ii); *see also Matter of Kellogg*, 1994-INA-00465, 1998 WL 1270641 (BALCA Feb. 2, 1998) (*en banc*). The Petitioner's statement, however, adds to the *Kellogg* language by indicating that any suitable combination of education, training, or experience is "consistent with" the other position requirements stated on the application. The statement therefore suggests that a combination of education and experience could meet the alternate educational requirement.

Counsel asserts that the Petitioner intended to allow a combination of education and experience to satisfy the requirement. But assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. Thus, the record lacks sufficient evidence to resolve the ambiguous alternate educational requirement stated on the labor certification.

On appeal, the Petitioner cites a federal court decision on a skilled worker petition, interpreting a labor certification requirement of a "B.A. or equivalent" as allowing a bachelor's degree equivalency based on a combination of education and experience. *See Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005). Because the petitioner there drafted the educational requirement with the beneficiary's background in mind, the court held that the record established the petitioner's acceptance of a combination of education and experience.

We acknowledge that, like the petitioner in *Grace Korean*, the Petitioner here drafted its alternate educational requirement with the Beneficiary in mind. The reasoning in a later federal court decision, however, persuades us that the record does not establish the Petitioner's intention to accept a combination of education and experience. *See SnapNames.com, Inc. v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In *SnapNames.com*, the court rejected *Grace Korean*'s reliance on a beneficiary's educational background, finding that USCIS "has an independent role in determining whether the alien meets the labor certification requirements." 2006 WL 3491005 at *7. The *SnapNames.com* court also found that "interpreting the labor certification on the basis of the named alien's background could undermine the DOL's certification" by "allowing a combination of education and work experience to count for alien workers while at the same time requiring a specific degree from domestic workers." *Id.* at *8.

Because the record does not establish the intended meaning of the Petitioner's alternate educational requirement, we will remand this matter for further fact-finding. On remand, the Director should request additional evidence of the requirement's intended meaning and afford the Petitioner a reasonable opportunity to respond. The Director should specifically request copies of documentation created during the labor certification process, including: the notice of filing; the job order filed with a state workforce agency; the prevailing wage determination; advertisements of the offered position in newspapers, online, and in the Petitioner's employee referral program; the recruitment report; any resumes or applications received in response to the recruitment efforts; and any correspondence with the

DOL. The Director should then determine whether the Petitioner gave DOL and U.S. workers notice of its acceptance of a degree equivalency based on a combination of education and experience, and if such notice was given, whether or not the Petitioner provided information on how such an equivalency would be calculated. The Director should then determine whether or not the Beneficiary meets the requirements of the labor certification.

III. THE BENEFICIARY'S QUALIFYING EXPERIENCE

Although unaddressed by the Director, the record also does not establish the Beneficiary's possession of the minimum experience required for the offered position. As previously indicated, regardless of whether the alternate educational requirement allows a combination of education and experience, the offered position requires at least one year of experience as an accountant or in an accounting-related occupation.

On the labor certification, the Beneficiary attested to his possession of more than six years of qualifying experience in India before beginning employment with the Petitioner in the United States in 2000.[3] The Beneficiary stated the following experience:

- About 33 months as a full-time senior accountant for an export house from June 1, 1997, to February 28, 2000;
- About 43 months as a part-time accounting consultant for an electronics component dealer from February 1, 1996, to September 22, 1999; and
- About 36 months as an accounting clerk for a wholesaler of auto parts from January 1, 1991, to December 31, 1993.

In support of the Beneficiary's claimed experience, the Petitioner submitted letters from the Beneficiary's purported former employers. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring a petitioner to submit letters from employers to establish a beneficiary's claimed qualifying experience).

A September 9, 1999, letter from the export house states the Beneficiary's employment as a senior accountant "for the past 3 years" and describes his duties in the position. Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), however, the letter does not identify the employer who signed it or that person's title. Rather, the letter's signatory is identified only as "Authorized Signatory." The letter therefore does not establish the Beneficiary's claimed, qualifying experience.

Also, the letter suggests that the Beneficiary began work for the export house in 1996. On the labor certification, however, the Beneficiary stated a start date with the company of June 1, 1997. The

[3] A labor certification employer may not generally rely on experience that a foreign national gained with it, unless the experience was gained in a position substantially different than the offered position or the employer demonstrates the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). The Petitioner here does not assert that the Beneficiary gained qualifying experience with it.

record therefore does not establish the Beneficiary's claimed, qualifying experience at the export house.

Consistent with the information on the labor certification, a letter from the electronics component dealer states that company's employment of the Beneficiary as an accounting consultant from 1996 to 1999 and describes his duties. Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), however, the letter does not name the partner who signed the document. The letter therefore does not establish the Beneficiary's qualifying experience.

Also, the Beneficiary's claimed experience with the electronics dealer conflicts with the Beneficiary's attestations on a labor certification filed by the Petitioner on his behalf in 2004. Contrary to the most recent certification and the dealer's letter, the prior certification states the dealer's employment of the Beneficiary from 1996 to 1997. The prior certification also states that the Beneficiary worked for the dealer full-time, rather than on a part-time basis. The inconsistencies in the Beneficiary's dates and nature of employment cast doubts on his claimed experience with the dealer. *See Matter of Ho*, 19 I&N Dec. 482, 591 (BIA 1988) (requiring petitioners to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). The record therefore does not establish the Beneficiary's claimed experience with the dealer.

As indicated in both labor certifications for the Beneficiary, the letter from the auto parts wholesaler states its employment of him as an accounting clerk from 1991 to 1993. The Beneficiary's university records, however, indicate that he studied full-time during most of that period. The record does not explain how the Beneficiary obtained full-time, qualifying experience with the wholesaler while simultaneously studying full-time for his degree. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies by independent, objective evidence).

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position. On remand, the Director should request additional evidence of the Beneficiary's qualifying experience and ask the Petitioner to resolve the discrepancies of record. After granting the company a reasonable period to respond, the Director, upon receipt of a timely response, should review the entire record and enter a new decision.

IV. CONCLUSION

The record lacks sufficient evidence to determine the alternate educational requirement of the offered position and whether the Beneficiary meets such a requirement. The record also does not establish the Beneficiary's possession of the minimum experience required for the offered position.

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 M-I-, Inc.*, ID# 750506 (AAO Dec. 5, 2017)