U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-T-, LLC

DATE: DEC. 21, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a consultant and provider of IT services to corporations, seeks to employ the Beneficiary as a software developer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This "EB-2" employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that Petitioner did not establish that the Beneficiary met the minimum experience requirement of the labor certification.

On appeal, the Petitioner asserts that the evidence of record establishes that the Beneficiary meets the experience requirement of the labor certification and should be approved for 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 obtains an approved labor certification (ETA Form 9089, Application for Permanent Employment 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, 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. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition (Form I-140, Immigrant Petition for Alien Worker) 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

[1] The date the labor certification is filed is called the "priority date." *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

A petition for an advanced degree professional must be accompanied by documentation showing that the Beneficiary is a professional holding an advanced degree. 8 C.F.R. § 204.5(k)(1). An "advanced degree" is defined as "[a]ny 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).

A beneficiary must have all of the education, training, experience, and other requirements specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg'l Comm'r 1977).

II. ANALYSIS

There are two issues in this case: (1) whether the Beneficiary meets the experience requirements of the labor certification, and (2) whether the Beneficiary qualifies for classification as an advanced degree professional. For the reasons discussed in this decision, we conclude that the Petitioner has not established that the Beneficiary meets the labor certification's minimum experience requirement and, as a result, that the Beneficiary does not qualify for advanced degree professional classification.

A. Minimum Requirements of the Labor Certification

The petition was accompanied by a labor certification with a priority date of October 9, 2015. The labor certification specifies in section H that the minimum requirements for the job offered are a bachelor's degree in technology, computer science, engineering, or a related field of study, or a foreign educational equivalent,[2] and five years of experience as a software (JAVA) developer, software engineer, JAVA consultant, or in related job. Thus, the labor certification requires a bachelor's degree and five years of qualifying experience.[3]

In section K the labor certification lists the Beneficiary's work experience as follows:

- August 10, 2007, to May 30, 2008 – associate system engineer with [redacted] in [redacted] India (294 days).
- June 2, 2008, to March 5, 2010 – software engineer with [redacted] in [redacted] India (641 days).
- March 8, 2010, to November 19, 2010 – senior software engineer with [redacted] in [redacted] India (256 days).

[2] The record demonstrates that the Beneficiary has the required education.

[3] The labor certification also specifies in section H that the five years of qualifying experience must include at least two years with JAVA development using [redacted] and two years of testing.

- November 29, 2010, to April 25, 2012 – software engineer with [redacted] in [redacted] India (513 days).
- October 1, 2013, to December 17, 2013 – JAVA consultant with [redacted] in [redacted] Texas (77 days).
- December 19, 2013 to the present – software developer (JAVA developer) with the Petitioner in [redacted] Kentucky.

The labor certification also states in section J that the Beneficiary did not gain any qualifying experience with the Petitioner in a position that is substantially comparable to the job opportunity at issue in this proceeding.

In a request for evidence (RFE) the Director advised the Petitioner that the record did not demonstrate that the Beneficiary had five years of qualifying post-baccalaureate experience by the priority date of October 9, 2015, as required to meet the experience requirement of the labor certification. Specifically, the Director noted that any qualifying experience claimed with the Petitioner must have been gained in a position that is not substantially comparable to the proffered position, or that it was no longer feasible to train a worker for the proffered position. Not counting the Beneficiary's employment with the Petitioner, the Director noted that the jobs listed in the labor certification amounted to 1,754 days of employment, which was less than five full years (1,825 days). In response to the RFE the Petitioner submitted a photocopied letter from [redacted] signing as "manager" of [redacted] stating that the Beneficiary "work[ed] as an unpaid intern trainee" from May 1 to August 5, 2007, as "part of a development project to build an in-house office utility solution for [redacted] employee management." No evidence was submitted that any of the Beneficiary's employment with the Petitioner was qualifying employment under the terms of the labor certification.

The evidence submitted is not sufficient to demonstrate that the Beneficiary has the required experience. First, as noted by the Director, the Beneficiary did not list her claimed employment with [redacted] on the labor certification and this omission lessons the credibility of the claimed employment. *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). The Petitioner contends that reliance on *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), which held that evidence of claimed experience is less credible if the experience was not listed on the labor certification, is misplaced because the [redacted] letter is primary evidence that meets the requirements of 8 C.F.R. § 204.5(g)(1). In our view, however, omitting the claimed [redacted] experience from the labor certification cannot be so easily dismissed. The instructions at section K of the labor certification (Alien Work Experience) expressly state that, in addition to all jobs held by the beneficiary in the past three years, "any other experience that qualifies the alien for the job opportunity" should be listed. That instruction certainly encompasses the Beneficiary's claimed experience with [redacted] Accordingly, we find that not listing [redacted] as a prior employer in the labor certification does lessen the credibility of the evidence subsequently submitted.

Moreover, the [redacted] letter has certain features which raise questions about its veracity. There appear to be as many as four different fonts on the one-page letter, from the letterhead at the top of

the page to information below a horizontal line at the bottom of the page which appears to describe the company's products and services and provides an address in India. Additionally, the letter is undated, and does not indicate whether the Beneficiary's work was full-time or part-time. On appeal, the Petitioner acknowledges in that the Beneficiary's work was not full-time and requests that it be considered half-time employment resulting in 48 days (rather than 96) of qualifying employment, but does not provide documentary evidence to substantiate this request. Given the discrepancies noted, the absence of information in the letter as to how many hours and days the Beneficiary actually worked, the omission of this claimed employment on the labor certification, and the lack of documentary evidence corroborating the alleged employment: we cannot conclude that the Beneficiary had any qualifying employment at

The Director also addressed the Beneficiary's claimed employment with finding that the evidence of the Beneficiary's employment with did not meet the substantive requirements of 8 C.F.R. § 204.5(g)(1). On appeal the Petitioner asserts that a letter from dated February 15, 2017, submitted in response to the Director's notice of intent to deny the petition, meets the substantive requirements of 8 C.F.R. § 204.5(g)(1), which reads, in pertinent part, as follows: "Evidence relating to qualifying experience . . . shall be in the form of letter(s) from current or former employer(s) . . . and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien . . ." Upon the review of the subject letter we agree that it meets the requirements of the foregoing regulation.

However, the February 2017 letter from certifies the Beneficiary's employment dates as August 10, 2007, to April 30, 2008, which is one month less than the time period asserted in the labor certification and in two earlier letters from dated in July 2008, which stated that the Beneficiary's employment ran until May 30, 2008. Adding further confusion, two other letters in the record, submitted in 2016 by former colleagues of the Beneficiary at , state that the Beneficiary's termination date was May 3, 2008.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.* In view of the inconsistent evidence discussed above, we cannot determine the duration of the Beneficiary's claimed employment with and cannot consider it as qualifying experience to meet the terms of the labor certification.

In accord with the foregoing analysis, we do not find the Beneficiary to have the required five years of qualifying post-baccalaureate experience. Therefore, the Beneficiary does not meet the minimum experience requirement of the labor certification.

B. Classification as an Advanced Degree Professional

To qualify for classification as an advanced degree professional, the Beneficiary must have an advanced degree or a U.S. baccalaureate or a foreign equivalent degree followed by at least five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2). The Beneficiary has the requisite U.S. bachelor's or foreign equivalent degree. For the reasons discussed above, however, the record does not establish that she has at least five years of qualifying post-baccalaureate experience.[4]

III. CONCLUSION

The Beneficiary does not meet the minimum experience requirement of the labor certification, and does not qualify for classification as an advanced degree professional.

ORDER: The appeal is dismissed.

Cite as *Matter of H-T- LLC*, ID# 946091(AAO Dec. 21, 2017)

[4] Moreover, even if we found that the Beneficiary did have work experience at deriving from her three-month internship, the record indicates that it was not qualifying post-baccalaureate experience. The Beneficiary claims that her internship lasted from May 1 to August 5, 2007, which means that all of her work experience at would have been gained before her bachelor of technology degree was issued on August 7, 2007. Thus, it was not post-baccalaureate experience, as required by 8 C.F.R. § 204.5(k)(2) to qualify for the requested classification of advanced degree professional.