U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-

DATE: DEC. 27, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a software development company, seeks to employ the Beneficiary as Director, Global Indirect Revenue.[1] 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 Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary possessed the education required by the labor certification as of the priority date. The Director noted that the labor certification does not permit foreign educational equivalent degrees, and that the Beneficiary does not possess a U.S. degree.

On appeal, the Petitioner submits additional evidence and asserts that it made a clerical error on the labor certification. It states that it intended to allow applicants to qualify for the offered job with foreign educational equivalent degrees.

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).[2] *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 with U.S. Citizenship and

[1] The job title listed on the labor certification application differs from the job title listed on the petition.

[2] The priority date of a petition is the date DOL accepted the labor certification for processing, which in this case is August 11, 2017. *See* 8 C.F.R. § 204.5(d).

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 BENEFICIARY'S EDUCATION

The Director denied the petition because the Petitioner did not establish that the Beneficiary possessed the education required by the labor certification as of the priority date.

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)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires a master's degree in computer science and 12 months of experience in the job offered. At Part H.9., the Petitioner indicated that a foreign educational equivalent is not acceptable.

The labor certification states that the Beneficiary received his master's degree in computer science from [redacted] France, in 2012. The record contains a certificate from [redacted] dated February 18, 2015, stating that the Beneficiary obtained his master of science degree in computer science in 2012; a copy of the Beneficiary's master of science degree issued by [redacted] in 2012; the Beneficiary's transcripts from his master's program at [redacted]; and a copy of the Beneficiary's bachelor of science degree issued by [redacted] in 2011.

In a notice of intent to deny (NOID), the Director indicated that the labor certification did not permit a foreign educational equivalent. Given that the record does not demonstrate that the Beneficiary has a U.S. degree, the Director notified the Petitioner that it had not established its eligibility for the benefit sought. In its response to the NOID, the Petitioner asserted that it made a clerical error on the labor certification and that it intended to allow applicants to qualify for the offered job with foreign educational equivalent degrees. It stated that it notified DOL about the error and DOL certified the ETA Form 9089, Application for Permanent Employment Certification, thereafter. It further stated that the labor certification clearly shows that the Beneficiary has a foreign degree, evidencing the Petitioner's intent to accept foreign educational equivalent degrees.

In his decision, the Director determined that the evidence did not establish that the Beneficiary possessed the education required by the labor certification. He stated that a letter from counsel indicating the Petitioner's intent to accept foreign equivalent degrees is not acceptable evidence.

On appeal, the Petitioner restates its assertions from its NOID response. It contends that because section J of the labor certification shows that the Beneficiary has a foreign degree and the Petitioner intends to hire him, the information on the labor certification establishes that the Petitioner will accept a foreign degree as equivalent to a U.S. degree for the position. However, Section J of the labor certification relates solely to the Beneficiary's own qualifications, apart from the minimum requirements of the offered position. The fact that the Beneficiary has a foreign degree does not

consequently demonstrate that the labor certification allows a foreign degree in lieu of a U.S. degree. *See, e.g., SnapNames.com, Inc. v. Chertoff,* No. CV 06-65-MO, 2006 WL 3491005, *7 (D. Or. Nov. 30, 2006) (finding that even though an employer may prepare a labor certification with a beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements). As discussed, the labor certification at Section H reflects that no foreign educational equivalent degree is acceptable for the proffered position.

During labor certification proceedings, DOL may review a beneficiary's qualifications for an offered position. *See, e.g.*, 20 C.F.R. § 656.17(i)(3) (barring a foreign national, as of his or her hiring by a labor certification employer, from having less training or experience than is required of U.S. applicants). USCIS, however, has the ultimate authority to determine a beneficiary's qualifications for a DOL-certified position and for the requested immigration classification. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b) (authorizing USCIS to approve a petition after determining that "the facts stated in the petition are true" and that a foreign national qualifies for the requested preference classification). Moreover, "DOL may gauge an alien's skill level in evaluating the effect of the alien's employment on United States workers," but that "does not foreclose [USCIS] from considering alien qualifications in the preference classification decision." *Madany v. Smith,* 696 F.2d 1008, 1012 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Co. v. Smith,* 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the labor certification application form. *Id.* at 834. In this case, the Petitioner stated at Part H.9. that no foreign degree was acceptable for the offered position.

The Petitioner further asserts that it notified DOL regarding its clerical mistake on the labor certification application prior to DOL's certification, but the record contains no correspondence between DOL and the Petitioner.[3] Further, the promulgation of 20 C.F.R. § 656.11(b), prohibits any modification to labor certifications filed after July 16, 2007. The Petitioner cannot make changes to the offered position on the labor certification. Moreover, as DOL made clear in the preamble to the proposed rule, Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, 71 Fed. Reg. 7655 (Feb. 13, 2006), "[u]nder proposed 656.11(b), DOL clarifies that requests for modification to an application submitted under the current regulation will not be accepted... [n]othing in the streamlined regulation contemplates allowing or permits employers to make changes to applications after filing." *Id.* at 7659. The preamble goes on to highlight that:

> The online application system is designed to allow users to proofread and revise before submitting the application, and [DOL] expects and assumes users will do so. Moreover, in signing the application, the employer declares under penalty of perjury that he or she has read and reviewed the application and the submitted information is true and accurate to the best of his or her knowledge. In the event of an inadvertent

[3] A petitioner bears the burden of establishing eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

> error or any other need to refile, an employer can withdraw an application, make the corrections and file again immediately... [i]n addition, the entire application is a set of attestations and freely allowing changes undermines the integrity of the labor certification process because changing one answer on an application could impact analysis of the application as a whole.

Id. Here, the attempt to change the answer from "no" to "yes" at Part H.9. materially changes the requirements of the offered position and impacts the analysis of the labor certification as a whole.

On appeal, the Petitioner cites a DOL frequently asked question (FAQ) relating to appeals of denied labor certification applications. *See* DOL, Office of Foreign Labor Certification (OFLC), OFLC Frequently Asked Questions and Answers, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!251 (last visited Dec. 20, 2018). The FAQ states that in limited circumstances, an employer may make corrections to a denied labor certification application and appeal the denial by requesting reconsideration within 30 days from the date of issuance of the denial. This FAQ is not applicable here, as the Petitioner did not appeal a denied labor certification to DOL by requesting reconsideration. Further, the FAQ states that corrections are only permitted by DOL when incorrect or missing information is the result of a typographical error and the correction is supported by documentation that existed at the time the application was filed (advertisements, notice of filing, prevailing wage determination, etc.). Here, the Petitioner submits a letter on appeal dated September 4, 2018, stating that it intended to accept foreign educational equivalent degrees. However, the record does not contain documentation of its intent that existed at the time the labor certification application was filed, such as the Petitioner's advertisements, notice of filing, or prevailing wage determination. Additionally, in *Matter of Sushi Shogun,* 2011-PER-02677 (BALCA May 28, 2013), the Board of Alien Labor Certification Appeals (BALCA) panel found that the promulgation of 20 C.F.R. § 656.11(b), prohibiting any modification to labor certifications filed after July 16, 2007, precluded the employer from making changes to the offered position on the labor certification. Similarly, the Petitioner is precluded from modifying the labor certification in this case.

In sum, the Petitioner has not established that the Beneficiary possessed a U.S. master's degree in computer science as required by the labor certification as of the priority date. Thus, the record does not establish that the Beneficiary is qualified for the offered position.

III. ABILITY TO PAY THE PROFFERED WAGE

Although not addressed by the Director, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the priority date. The proffered wage is $147,243 per year. The record must show the Petitioner's ability to pay the proffered wage from the priority date of August 11, 2017, onward.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The record does not contain an annual report, federal tax return, or audited financial statements for the Petitioner as of the priority date in 2017 as required by 8 C.F.R. § 204.5(g)(2).[4] Thus, the Petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

IV. CONCLUSION

The Petitioner has not established that the Beneficiary possessed the education required by the labor certification as of the priority date. The Petitioner has also not established its continuing ability to pay the proffered wage from the priority date.

ORDER: The appeal is dismissed.

Cite as *Matter of D-*, ID# 2194133 (AAO Dec. 27, 2018)

[4] The record contains the Petitioner's federal income tax return for calendar year 2016. It shows a significant net loss and considerable net current liabilities. The petition and labor certification indicate that the Petitioner employs 80 employees.