U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF LCJI-S- INC.

DATE: FEB. 3, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an insurance brokerage firm, seeks to employ the Beneficiary as an account supervisor. It requests classification of the Beneficiary as an unskilled worker under the third preference immigration classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than 2 years of training or experience.

The Director, Nebraska Service Center, denied the petition, finding that the record did not establish the Petitioner's ability to pay the Beneficiary the proffered wage. The Director also denied the petition pursuant to the regulation at 8 C.F.R. § 103.2(b)(14), as the Petitioner had not provided other requested evidence.

The matter is before us on appeal. The Petitioner asserts that it has submitted sufficient evidence to establish its ability to pay in this matter and that the Director did not consider the totality of its circumstances in reaching his decision. It also provides evidence to overcome the Director's denial under 8 C.F.R. § 103.2(b)(14).

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

I. LAW

Employment-based immigration is generally a three-step process. First, a U.S. employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (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). Next, the U.S. 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. Finally, if USCIS approves the immigrant visa 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.

By approving the labor certification in this case, DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of 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)(II) of the Act.

In visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified in the underlying labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

II. ANALYSIS

For the reasons discussed below, we will withdraw the Director's findings. However, we will also consider whether the Beneficiary has the experience required for the job offered and whether the Petitioner intends to employ the Beneficiary in the proffered position.

A. Ability to Pay

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.

A petitioner must establish that its job offer to a beneficiary is a realistic one. Because the filing of a labor certification establishes a priority date for any immigrant petition later based on the labor certification, a petitioner must establish that the job offer was realistic as of the priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.[1] 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 a

[1] The priority date of a petition is the date that DOL accepts the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

petitioner to demonstrate financial resources sufficient to pay a beneficiary's proffered wage, 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. at 612.

To determine a petitioner's ability to pay the proffered wage, USCIS first examines whether a petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL and whether it continues to do so. If a petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence may be considered proof of its ability to pay. If a petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, audited financial statements, or annual reports.[2] If a petitioner's net income during the required time period does not equal or exceed the proffered wage, or when added to any wages paid to the beneficiary does not equal or exceed the proffered wage, USCIS will next review the petitioner's net current assets.

In cases where neither a petitioner's net income nor its net current assets establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its business activities. *Matter of Sonegawa*, 12 I&N Dec. at 612. In assessing the totality of a petitioner's circumstances, USCIS may look at such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

In the present case, the priority date of the visa petition is September 4, 2015, and the proffered wage is $75,000 per year. Therefore, the Petitioner must demonstrate its ability to pay the Beneficiary the annual wage of $75,000 from September 4, 2015, onward.

In his decision, the Director concluded that the evidence of record established the Petitioner's ability to pay in 2015, but not in 2016. The Director's finding appears to have been based on his review of the three earnings statements submitted in response to a request for evidence (RFE), which, he noted, reflected monthly wages of $4560 that did not equal or exceed the annual proffered wage of $75,000.

Although we agree that the submitted earnings statements for the Beneficiary do not reflect that the Petitioner is currently paying her the annual proffered wage, a petitioner is not required to pay a beneficiary the proffered wage until such time as that beneficiary obtains lawful permanent resident

[2] Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd.*, 736 F.2d 1305); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); K.*C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

status. Accordingly, the Director erred in relying on the Beneficiary's current wages to find that the Petitioner had not established its ability to pay in 2016. Due to the unavailability of documents relating to 2016 at the time the petition was filed on March 24, 2016, and at the time the Petitioner responded to the RFE, we can only evaluate the Petitioner's ability to pay the proffered wage in 2015, the year of the priority date.

As noted by the Director, the record demonstrates the Petitioner's ability to pay in 2015. As such, the Petitioner has established its ability to pay the proffered wage from the September 4, 2015, priority date onward. Therefore, we will withdraw the Director's finding to the contrary.

B. Unsigned Labor Certification

The regulation at 8 C.F.R. § 204.5(l)(3) states that "[e]very petition under this classification [skilled workers, professionals, and other workers] must be accompanied by an individual labor certification from the Department of Labor."

The regulation at 20 C.F.R. § 656.17(a) states, in pertinent part, that:

> [a]n employer who desires to apply for a labor certification on behalf of an alien must filed a completed Department of Labor *Application for Permanent Employment Certification* form . . . . Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS [Department of Homeland Security] will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

The regulation at 8 C.F.R. § 103.2(b)(8)(ii) provides:

> (ii) *Initial evidence.* If all required initial evidence is not submitted with the benefit request or does not demonstrate eligibility, USCIS in its discretion may deny the benefit request for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

In this case, the original certified labor certification filed with petition was not signed by the Petitioner, the Beneficiary, and the Petitioner's counsel. The Director informed the Petitioner of this deficiency in his April 1, 2016, request for evidence and, pursuant to 8 C.F.R. § 103.2(b)(8)(ii), requested the submission of copies of pages 8 and 9 of the labor certification with the original signatures of its president, counsel and the Beneficiary. In response, the Petitioner submitted a copy of the labor certification bearing only the signatures of its president and counsel. Noting that the submitted copy had not been signed by Beneficiary as requested, the Director denied the visa petition pursuant to 8 C.F.R. § 103.2(b)(14), which, in part, states: "Failure to submit requested

evidence which precludes a material line of inquiry shall be grounds for denying the benefit request."

On appeal, the Petitioner apologizes for its "inadvertent" submission of the unsigned labor certification at the time of filing and provides a new copy of the labor certification, signed by all required parties, its president, its counsel, and the Beneficiary. In that the Director's RFE provided the Petitioner with the opportunity to sign the labor certification subsequent to the filing of the visa petition, we will accept the Petitioner's properly signed copy of the labor certification on appeal. Accordingly, we find the Petitioner to have submitted the signed and certified labor certification required by the regulation at 20 C.F.R. § 656.17(a) and, therefore, will also withdraw the Director's finding that the visa petition may be denied pursuant to 8 C.F.R. § 103.2(b)(14).

C. Beneficiary Qualifications

Although the Beneficiary's qualifications for the job opportunity were not previously considered by the Director, our review of the record leads us to conclude that the Beneficiary may not rely on the qualifying employment she has claimed in Part K. of the labor certification to meet the requirements of the offered position.

A petitioner must establish a beneficiary's possession of all the education, training, or experience stated on an accompanying labor certification by a petition's priority date. 8 C.F.R. § 103.2(b)(1), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Part H. of the labor certification states the following requirements for the offered position of account supervisor:

H.4.	Education: Associate's.
H.4-B.	Major field of study: Accounting, finance.
H.5.	Training: None required.
H.6.	Experience in the job offered: Required.
H.6-A.	Number of months experience required: 12.
H.7.	Alternate field of study: None accepted.
H.8.	Alternate combination of education and experience: None accepted.
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in an alternate occupation: Accepted.
H.10-A.	Number of months experience required in alternate occupation: 12.
H.10-B.	Job title of acceptable alternate occupation: Account executive, accountant.
H.14.	Specific skills or other requirements: Employer accepts any suitable combination of education, experience, and training consistent with H4 through H10 of the ETA 9089.

Accordingly, to qualify for the offered position in this case, the Beneficiary must hold a U.S.

associate's or foreign equivalent degree in accounting or finance, and have 12 months of experience in the offered position of account supervisor, or, alternately, in the occupations of account executive or accountant.

Although the record establishes that the Beneficiary holds the required associate's degree, it does not also demonstrate that she has the 12 months of experience as an account supervisor,[3] account executive, or accountant.

In Part K of the labor certification, the Beneficiary claims the following employment experience:

- Account executive, [redacted] from November 20, 2014, to the present (date of labor certification's filing);
- Account executive, [redacted] from October 1, 2008, to September 15, 2014; and
- Accountant, [redacted], from May 1, 1991, to February 1, 1998.

To establish a beneficiary's qualifying experience in employment-based immigration proceedings, the regulation at 8 C.F.R. § 204.5(g)(1) requires that:

> [E]vidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The Petitioner has submitted no letter from the [redacted] to establish its employment of the Beneficiary as an accountant. Here, the only document that addresses the above requirements is a March 3, 2016, letter provided by the Petitioner's president, [redacted] at the time of the visa petition's filing. Therefore, we will consider only whether the Beneficiary is qualified for the offered position based on her employment with the Petitioner as an account executive.

We note that DOL regulations at 20 C.F.R. § 656.17 do not allow a beneficiary to qualify for an offered position based on employment experience gained with a petitioner unless it is established that the work performed by the beneficiary was not "substantially comparable" to the job offered.[4]

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[3] We note that the Petitioner answered "No" in response to the question in Part J.18. of the labor certification, "Does the alien have the experience as required for the requested job opportunity indicated in question H.6?" Accordingly, the Petitioner is not seeking to establish that the Beneficiary is qualified for the offered position based on 12 months of experience as an account supervisor.

[4] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> 5) For purposes of this paragraph (i):
>
> . . .

Our review of the record in this matter finds that the Petitioner checked "No" in response to the question in Part J.21 of the labor certification, which asks "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?" Generally, if the answer to the question in Part J.21. of the labor certification is no, then experience with the employer may be used by a beneficiary to qualify for the offered position if that experience was not substantially comparable and the terms of the labor certification in Part H.10 allow applicants to qualify for the job opportunity through an alternate occupation.

Here the labor certification deems experience in the alternate occupations of account executive or accountant as acceptable. The question then is whether the Beneficiary's current job with the Petitioner is in fact not "substantially comparable" to the proffered position.

Here, the duties of the offered position of account supervisor, as listed in Part H.11 of the labor certification, are as follows:

> Perform financial analytical work in the evaluation and management of the business operations and client management (25%). Direct and coordinate activities to oversee quality control and customer satisfaction (25%), Lead, maintain and support client growth strategies contributing to increased agency performance ratings and incremental revenues (20%). Lead the professional development of new client services employees to provide guidance and support that drive the growth of the individual (10%). Participate in evaluation and measurement of business results and consumer insights (10%). Perform financial data analysis and generate reports to address business needs (10%).

The duties of the Beneficiary's current position of account executive, as stated in Part K of the labor certification, include:

> Perform crucial decision making duties in domestic sales activities by negotiating contracts, formulating contract modifications and conducting business development (30%). Conduct market and demographic studies to seek new products and packages for clients (25%). Create and update sales analysis and market activity reports to summarize corporate activities (25%). Analyze and improve corporate strategies by developing new and innovative policies and strategies for the company (20%).

(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

Based on the above descriptions, the offered position of account supervisor and the Beneficiary's current job of account executive would appear sufficiently distinct to satisfy DOL regulation. Nevertheless, for the reasons that follow, we do not find the record to establish that the Beneficiary's experience with the Petitioner qualifies her for the offered position.

In his March 3, 2016, letter, the Petitioner's president, states that his business is faced with "the challenge to keep up with the competitive world of the insurance services industry" and that he, therefore, wishes to "continue to employ [the Beneficiary] as an Account Executive." He follows this statement with a description of the Beneficiary's current duties,[5] indicating that she will continue to perform these same duties if the visa petition is approved. At no point in his letter does mention the offered position of account supervisor or address the duties listed in Part H.11 of the labor certification. Therefore, based on depiction of the offered position as a continuation of the Beneficiary's current duties, the record does not establish that the Beneficiary's experience with the Petitioner is not substantially comparable to the offered position, as described by the Petitioner. 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). Accordingly, based on the inconsistencies presented regarding the duties of the offered position, pursuant to 20 C.F.R. § 656.17, it is not clear that the Beneficiary's employment as an account executive with the Petitioner may be used to provide her with the 12 months of experience required by the labor certification.

As it is not clear that the Beneficiary may rely on her experience with the Petitioner to qualify for the offered position and the record contains no letter from documenting her employment as an accountant, the Petitioner has not demonstrated that the Beneficiary has the 12 months of experience required by the labor certification. Therefore, although we have withdrawn the Director's decision in this matter, the petition cannot be approved as the record does not establish the Beneficiary's eligibility for the offered position.

D. Petitioner's Intent to Employ the Beneficiary in the Offered Position

Further, we also find March 3, 2016, letter to raise concerns as to whether the Petitioner intends to employ the Beneficiary under the terms of the labor certification.

A labor certification is valid only for the particular job opportunity, the beneficiary, and the stated geographical area of intended employment. 20 C.F.R. § 656.30(c). A petitioner must intend to employ a beneficiary according to the terms of the labor certification accompanying the visa petition. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (upholding a visa

[5] We note that a September 12, 2014, employment verification statement signed by in support of a prior Form I-140, Immigrant Petition for Alien Worker, petition filed on behalf of the Beneficiary describes a different set of duties for the account executive position with the Petitioner that focus largely on financial analysis. In any future proceedings, the Petitioner will need to address these disparate descriptions of its employment of the Beneficiary as an account executive.

petition denial where the petitioner did not intend to employ the beneficiary as a live-in domestic worker pursuant to the terms of the labor certification).

Here, we find March 3, 2016, letter to cast doubt on the existence of the job opportunity described in the labor certification, i.e., that it represents a *bona fide* job offer. In light of previously noted statements, we do not find the record to establish that the Petitioner will employ the Beneficiary in the offered position of account supervisor, according to the terms of the labor certification.

As the record does not establish that the Petitioner intends to employ the Beneficiary according to the terms of the labor certification, the petition may not be approved for this reason as well.

III. CONCLUSION

For the reasons already discussed, we withdraw the Director's decision. Nevertheless, the petition may not be approved, as the record does not demonstrate that the Beneficiary's employment experience qualifies her for the job opportunity or that the Petitioner intends to employ her according to the terms of the labor certification.

In visa 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.

ORDER: The decision of the Director, Nebraska Service Center, is withdrawn. The matter is remanded to the Director, Nebraska Service Center, for further proceedings consistent with the foregoing opinion and for entry of a new decision.

Cite as *Matter of LCJI-S- Inc.*, ID# 43564 (AAO Feb. 3, 2017)