U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-C- INC.

DATE: FEB. 21, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of carpentry and other construction services, seeks to employ the Beneficiary as an accountant. It requests classification of the Beneficiary as a professional under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This category allows a U.S. business to sponsor a professional with a bachelor's degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition. The Director concluded that the record did not establish the Beneficiary's possession of the educational qualifications for the offered position and the requested classification.

The matter is now before us on appeal. The Petitioner asserts the Beneficiary's possession of the required educational qualifications.

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

I. LAW AND ANALYSIS

A. The Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, a prospective 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 employer must file a 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. Finally, if USCIS approves the petition, a 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, the DOL certified that U.S. workers are not able, willing, qualified, and available for the offered position of accountant. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the Beneficiary's employment in the position will not hurt the wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5)(A)(i)(II).

In immigrant visa petition proceedings, USCIS must determine whether the Beneficiary meets the requirements of the offered position certified by the DOL. USCIS must also consider the eligibility of the Petitioner and the Beneficiary for the requested classification. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service "makes its own determination of the alien's entitlement to [the requested] preference status").

B. The Beneficiary's Educational Qualifications

Here, the Petitioner requests classification of the Beneficiary as a professional. *See* section 203(b)(3)(A)(ii) of the Act; *see also* 8 C.F.R. § 204.5(l). The petition must therefore be accompanied by a valid labor certification demonstrating that "the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i).

To qualify for the requested classification, the Beneficiary must possess at least a baccalaureate degree, *see* 8 C.F.R. § 204.5(l)(3)(ii)(C), and have all the education, training, and experience specified on the labor certification by the petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (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).

At issue is whether the Beneficiary has the education required to meet the terms of the labor certification and the requested classification of professional. In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

Here, the labor certification states the minimum requirements of the offered position of accountant as a U.S. bachelor's degree or a foreign equivalent degree in accounting, plus 24 months of experience in the job offered. The labor certification also states that "No" alternate combination of education and experience is acceptable.

The Beneficiary attested on the labor certification to her possession of a bachelor's degree in accounting. She stated that she received the degree in 2009 from the [redacted] in Ireland. The record contains a copy of an October 29, 2009, bachelor of business degree in accounting and finance from the institute in the Beneficiary's name. The accompanying documentation indicates that the degree required only 3 years of study.

The Petitioner submitted an expert evaluation of the Beneficiary's foreign educational credentials. The evaluation concludes that the Beneficiary's bachelor's degree equates to a U.S. bachelor of science degree in accounting. However, the evaluation does not mention that the Beneficiary's degree required only 3 years of study, nor does it explain how the Beneficiary's 3-year bachelor's degree equates to a 4-year, U.S. bachelor's degree. U.S. bachelor's degrees generally require 4 years

of study. *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977). The Director therefore correctly found that the evaluation does not establish the Beneficiary's possession of a U.S. bachelor's degree or a foreign equivalent degree as required for the offered position and for the requested classification. If an expert opinion conflicts with evidence of record or is "in any way questionable," we may reject it or afford it less evidentiary weight. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988); *see also Matter of D-R-*, 26 I&N Dec. 145, 160 n.13 (BIA 2011) (noting that expert testimony may be afforded different evidentiary weight depending on an expert's qualifications and the testimony's relevance, reliability, and probative value).

The Director also noted that the Electronic Database for Global Education (EDGE), an online tool that federal courts have found to be a reliable, peer-reviewed source of information about foreign educational equivalencies, indicates that the Beneficiary's foreign degree does not equate to a U.S. bachelor's degree. *See, e.g., Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (holding that USCIS may discount letters and evaluations submitted by a petitioner if they differ from reports in EDGE, which is "a respected source of information").[1] EDGE reports that a 3-year bachelor's degree in Ireland is comparable to 3 years of university studies in the United States. As previously indicated, U.S. bachelor's degrees usually require 4 years of study. *Shah*, 17 I&N Dec. at 245.

On appeal, the Petitioner asserts that the Beneficiary's 3-year bachelor's degree meets the requirements specified on the labor certification and for classification as a professional. We disagree. Concerning the requirements of the offered position, the Petitioner specifically stated in part H.4 of the labor certification that the offered position requires a "Bachelor's" degree, rather than an "Associate's" degree or some "Other" educational credential. While part H.9 of the labor certification states that a foreign equivalent of a U.S. bachelor's degree is also acceptable, part H.8 states that the Petitioner will not accept an alternate combination of education and experience. Part H.14 states a "[m]inimum [educational] requirement of [a] Bachelor's degree in Accounting or [a] Foreign Equivalent." This language appears to reinforce the educational requirements stated in parts H.4 and H.9 of the labor certification. Thus, the plain language of the labor certification states the minimum educational requirement of the offered position as a U.S. bachelor's degree, or a foreign equivalent degree, in accounting.

As discussed above, the record does not establish the equivalency of the Beneficiary's 3-year bachelor's degree to a U.S. bachelor's degree. We therefore find that the Beneficiary does not have a U.S. bachelor's degree, or a foreign equivalent degree, in accounting, and does not meet the terms of the labor certification.

[1] EDGE was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO is a "non-profit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2600 institutions in more than 40 countries." *See* AACRAO, at http://www4.aacrao.org/centennial/about.htm (last visited Jan. 30, 2017).

We next examine whether the Beneficiary has the education required for classification as a professional. The Act and its legislative history indicate that a professional worker must possess at least a U.S. bachelor's degree or a foreign equivalent degree. The degree may not combine lesser educational credentials, or education and experience. In response to public criticism that the regulations bar the substitution of experience for baccalaureate education in immigrant visa petitions, the former Immigration and Naturalization Service (INS) reviewed the Immigration Act of 1990, Pub. L. 101-649. The INS concluded that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor's degree." Final Rule for Immigrant Visa Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991). As noted, the record does not demonstrate the Beneficiary's possession of a U.S. bachelor's degree or foreign equivalent degree. Therefore, the Beneficiary is ineligible for classification as a professional.

In sum, the record does not establish the Beneficiary's possession of the educational qualifications required for the requested classification or for the offered position, as specified on the labor certification. We will therefore affirm the Director's decision and dismiss the appeal.

C. Remaining Issues

The Director did not address other defects in the petition. Because the Petitioner did not receive notice of these remaining issues and an opportunity to respond to them, they will not constitute grounds for dismissal of this appeal. *See* 8 C.F.R. § 103.2(16)(i) (requiring USCIS, before issuing an adverse decision, to advise a petitioner of derogatory information of which it is unaware and to afford it an opportunity to respond). In any future filings in this matter, however, the Petitioner must submit additional evidence to overcome the following defects.

1. The Petitioner's Intention to Employ the Beneficiary

A U.S. business may file an immigrant visa petition if it is "desiring and intending to employ" a foreign national. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). A petitioner must intend to employ a beneficiary pursuant to the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where a petitioner did not intend to employ a beneficiary as a live-in domestic worker pursuant to the terms of an accompanying labor certification).

For labor certification purposes, an employer must propose to employ a foreign national full-time in the United States and must possess a valid, distinctive federal employer identification number (FEIN). 20 C.F.R. § 656.3 (defining the term "employer").

Here, the labor certification states the Petitioner's intention to employ the Beneficiary full-time as an accountant. The Form I-140 and the labor certification identify the Petitioner by the same address and FEIN. However, online, public information indicates that a separate, active corporation, [redacted] operates at the same address as the Petitioner. *See* N.Y. Dep't of State, Div. of Corps.,

Entity Info., at http://www.dos.ny.gov/corps/bus_entity_search.html (last visited Jan. 30, 2017). This company's website states that the Petitioner and another company merged in 2011 to form the company now known as *See* at (last visited Jan. 30, 2017). The online information indicates that the Petitioner merged to form a new company in 2011, before the filing of the labor certification. As such, it is unclear whether the Petitioner was in fact eligible to file the labor certification and Form I-140 as a U.S. employer. Moreover, information regarding the merger raises doubts about the Petitioner's current business operations and its intention to employ the Beneficiary.

2. The Petitioner's Ability to Pay the Proffered Wage

Our review of the record has also found insufficient evidence of the Petitioner's ability to pay the proffered wage. A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In this case, the petition's priority date is February 22, 2015.[2] The record contains a copy of the Petitioner's federal income tax return for 2014, the most recent returns available at the time of filing. Pursuant to 8 C.F.R. § 204.5(g)(2), however, the record lacks required evidence of the Petitioner's ability to pay the proffered wage in 2015, the year of the petition's priority date. The Petitioner did submit a profit and loss statement for 2015, but, contrary to 8 C.F.R. § 204.5(g)(2), the record does not indicate that this financial statement was audited. Therefore, the profit and loss statement does not establish the Petitioner's ability to pay the proffered wage in 2015.

Thus, the record lacks required evidence of the Petitioner's ability to pay the proffered wage from the petition's priority date onward.

II. CONCLUSION

The record does not establish the Beneficiary's educational qualifications for the offered position or the requested classification. We will therefore affirm the Director's decision and dismiss the appeal. In any future filings in this matter, the Petitioner must also establish its intention to employ the Beneficiary and its ability to pay the proffered wage.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner did not meet that burden.

[2] This is the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

ORDER: The appeal is dismissed.

Cite as *Matter of N-C- Inc.*, ID# 95896 (AAO Feb. 21, 2017)