U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-F-G- INC.

DATE: FEB. 27, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of accounting, financial planning, and consulting services, seeks to employ the Beneficiary as a management consultant. 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, Texas Service Center, denied the petition. The Director concluded that the record did not establish the offered position's need for a professional. The matter is now before us on appeal. The Petitioner asserts that the position does require a professional.

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

I. LAW AND ANALYSIS

A. Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, an 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, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, a foreign national must 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 there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of management consultant. *See* 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. *See* section 212(a)(5)(A)(i)(II).

In visa petition proceedings, USCIS must determine whether the Beneficiary meets the requirements of the offered position certified by the DOL. USCIS must also determine whether the Petitioner and

the Beneficiary qualify for the requested immigrant 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. Labor Certification Requirements for Professional Classification

A petition for a professional must be accompanied by a valid individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i). A labor certification for a professional "must demonstrate that the job requires the minimum of a baccalaureate degree." *Id.*

In determining a job opportunity's requirements, we must examine the job offer portion of an accompanying 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 primary requirements of the offered position of management consultant as a U.S. bachelor's degree or a foreign equivalent degree in business administration or management, plus 6 months of experience in the job offered. Part H.8 of the labor certification also states that the Petitioner will accept an alternate combination of education and experience in the form of an associate's degree and 2 years of experience. In addition, Part H.14 of the labor certification states that "[a]ny suitable combinations of education, training or experience are acceptable."

The plain language of the labor certification states the Petitioner's acceptance of an "Associate's" degree. Thus, contrary to 8 C.F.R. § 204.5(l)(3)(i), the accompanying labor certification does not demonstrate that the job requires the minimum of a bachelor's degree. The labor certification is therefore does not support the requested classification of professional.

The Petitioner asserts that we should interpret the immigrant visa requirements for a professional consistent with the nonimmigrant visa requirements for an H-1B worker in a specialty occupation. To qualify as an H-1B specialty occupation worker, a beneficiary may possess a combination of education, training, or work experience equivalent to a U.S. bachelor's degree. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (allowing 3 years of training or experience to substitute for each lacking year of college or university). The Petitioner asserts: "There is no legitimate[] statutory[] or regulatory reason to differentiate" between the requirements for immigrant professionals and H-1B specialty occupation workers.

We disagree. The Act and its legislative history indicate that an immigrant professional must possess a bachelor's degree without combining educational credentials or education with experience. In response to complaints that the immigrant visa regulations bar the substitution of experience for

education, the former Immigration and Naturalization Service (INS) reviewed the Immigration Act of 1990. The former INS found 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." 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991); *see also SnapNames.com v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005, **10-11 (D. Or. Nov. 30, 2006) (holding that USCIS properly concludes that classification as a professional or advanced degree professional requires a single degree equivalent to a baccalaureate). Thus, contrary to the Petitioner's assertion, an immigrant petition for a professional must show that the proffered position requires at least a single-source bachelor's degree.

The Petitioner also asserts that DOL policy supports classification of the Beneficiary as a professional. Citing a March 1993 letter from a DOL official, the Petitioner states that the agency interprets the phrase "or equivalent" on labor certifications to include degree equivalencies based on experience or combinations of education and experience. The DOL policy asserted by the Petitioner, however, no longer appears to apply. In a 1994 memorandum, a DOL official stated that employers should not state "or equivalent" on labor certification applications to reference degree equivalencies based on experience or combinations of education and experience. The memo states: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." Memorandum from Anna C. Hall, Acting Reg'l Adm'r, DOL, Emp't & Training Admin., *Interpretation of "Equivalent Degree,"* 2 (June 13, 1994).

Moreover, even if the DOL policy asserted by the Petitioner applied, the issue is not whether the Beneficiary meets the requirements stated on the labor certification. Rather, the issue is whether the labor certification requires a professional worker with a bachelor's degree. On the labor certification, the Petitioner specified its acceptance of an associate's degree plus 2 years of experience in lieu of a bachelor's degree plus 6 months of experience. The labor certification therefore does not demonstrate that the offered position requires the minimum of a bachelor's degree.

The Petitioner also states that its alternate requirement of an associate's degree plus 2 years of experience is "substantially equivalent" to its primary requirement of a bachelor's degree plus 6 months of experience. The Petitioner refers to the DOL regulation at 20 C.F.R. § 656.17(h)(4)(i), which states that "[a[lternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity"). However, the Petitioner's apparent compliance with 20 C.F.R. § 656.17(h)(4)(i) does not change its acceptance of a worker in the offered position with less than a bachelor's degree. For labor certification purposes, the Petitioner's primary and alternate requirements may be substantially equivalent; but they do not demonstrate that the offered position requires at least a bachelor's degree.

For the foregoing reasons, the labor certification does not demonstrate that a bachelor's degree is a minimum, educational requirement of the offered position. Thus, the labor certification does not

support the requested classification of professional. We will therefore affirm the Director's decision and dismiss the appeal.

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

Although unaddressed by the Director, the record also does not establish 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). Initial evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In this case, the labor certification states the proffered wage of the offered position of management consultant as $51,022 per year. The petition's priority date is June 24, 2014. This is the date that the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The record lacks initial, required evidence of the Petitioner's ability to pay the proffered wage from the petition's priority date onward. The Petitioner submitted copies of financial statements covering the first 11 months of 2014. But, contrary to the regulations, the record does not indicate that the financial statements are audited. *See* 8 C.F.R. § 204.5(g)(2) (stating that evidence of ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements"). The financial statements therefore do not constitute required evidence of the Petitioner's ability to pay.

The record lacks regulatory required evidence of the Petitioner's ability to pay the proffered wage. For this additional reason, we will dismiss the appeal.

II. CONCLUSION

The labor certification does not demonstrate that the offered position requires a minimum of a bachelor's degree. Thus, the labor certification does not support the requested classification of professional. In addition, the record does not establish the Petitioner's continuing ability to pay the proffered wage form the petition's priority date onward.

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.

ORDER: The appeal is dismissed.

Cite as *Matter of S-F-G- Inc.*, ID# 145512 (AAO Feb. 27, 2017)