U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-H- INC

DATE: FEB. 28, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a hospital, seeks to employ the Beneficiary as a budget analyst. It requests classification of the Beneficiary as a professional under the third preference immigrant category. 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 on the ground that the Petitioner did not establish that the Beneficiary met the minimum experience requirement of the labor certification.

On appeal the Petitioner asserts that the evidence it has submitted is sufficient to establish that the Beneficiary has the qualifying experience required by the labor certification.

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 U.S. 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 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.

[1] The date the labor certification is filed with the DOL is called the "priority date." *See* 8 C.F.R. § 204.5(d). In this case the priority date is February 1, 2016.

II. ANALYSIS

A beneficiary must meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case the labor certification states that 12 months of experience as a budget analyst is required for the job. The labor certification states that the Beneficiary met this requirement by virtue of his employment as a budget analyst by [redacted] in [redacted] Philippines, from June 1, 1996, to February 1, 2002.

The specific evidentiary requirements to establish qualifying experience are set forth in the regulation at 8 C.F.R. § 204.5(g)(1), which reads in pertinent part as follows:

> Evidence 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 three virtually identical letters from [redacted] who asserts that she was head of the thrift banking group of the [redacted] in [redacted] Philippines, from 1995 to 2007 and supervised the Beneficiary when he was employed by the bank as a budget analyst from June 1996 through February 2002. In the request for evidence and notice of intent to deny which were issued prior to the decision the Director noted that [redacted] claimed to be a former co-worker of the Beneficiary, not his employer.[3] In his denial decision the Director noted the Petitioner's claim that letters from the Beneficiary's former employer were unavailable because [redacted] had merged with another bank, [redacted], but he found that the Petitioner had not shown why the merger made evidence about [redacted] former employees unavailable. In the absence of any corroborating evidence to verify the Beneficiary's employment by [redacted] the Director concluded that the affidavit submitted by [redacted] was not persuasive evidence that the Beneficiary was employed by [redacted]

On appeal the Petitioner asserts once again that a letter from the Beneficiary's former employer containing the information required in 8 C.F.R. § 204.5(g)(1) was unavailable because Equitable merged with [redacted] in December 2006 and no longer exists, as [redacted] was the surviving entity. The Petitioner submits a [redacted] search result stating that [redacted] ceased operations in 2007. The Petitioner also referred to a previously submitted article from Wikipedia discussing the [redacted] merger with [redacted] as well as an excerpt from [redacted] webpage showing that its corporate address is the same as [redacted] old address. Since no employment verification letter can be produced from [redacted] because it no longer exists, the Petitioner contends that we should accept the affidavit of

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[2] The first letter was submitted as initial evidence with the petition, the second in response to the Director's request for evidence, and the third (a sworn affidavit) in response to the Director's notice of intent to deny the petition.

[3] The Petitioner has not submitted evidence of [redacted] employment with [redacted]

the Beneficiary's former supervisor as good evidence of the Beneficiary's employment experience with

However, the Petitioner has not demonstrated that a letter cannot be obtained from the surviving entity of the merger, to confirm whether the Beneficiary was previously employed by The Petitioner has not explained why employment records of would disappear, or be suddenly unavailable, just because the bank merged with and ceased to be a separate entity. The enlarged that emerged from the merger would have included the assets, liabilities, and records of including the personnel records of current and former employees. The Petitioner has not submitted any evidence that it inquired directly with about obtaining a letter verifying the Beneficiary's prior employment with nor any evidence that cannot, or will not, produce such a letter. Therefore, we are not persuaded by the Petitioner's claim that a letter cannot be obtained from to verify the Beneficiary's employment with We will not accept the affidavit of a purported former co-worker at as a substitute for a letter from since that entity incorporates the bank that allegedly employed the Beneficiary.

As stated above, 8 C.F.R. § 204.5(g)(1) authorizes USCIS to consider "other documentation relating to the [Beneficiary's] experience" if letters from current or former employers are "unavailable." In this case, however, the Petitioner has not shown that a letter verifying the Beneficiary's experience is unavailable from the surviving entity of the merger that incorporated the Beneficiary's former employer. Moreover, although we will consider other documentation if the Petitioner demonstrates the required evidence is unavailable, the Petitioner continues to bear the burden of establishing eligibility for the benefit sought. Here, the Petitioner has not offered any documentary evidence to corroborate the claims made in the letter from Accordingly, we find that the Petitioner has not established that the Beneficiary has at least 12 months of qualifying employment as a budget analyst, as required to meet the experience requirement of the labor certification.

III. CONCLUSION

The Petitioner has not established that the Beneficiary has the requisite experience to meet the minimum experience requirement of the labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of A-H- Inc*, ID# 989209 (AAO Feb. 28, 2018)