U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-S-T- LLC

DATE: JAN. 19, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a trader of ships and scrap metals, seeks to employ the Beneficiary as an executive sales manager. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This category allows a U.S. business to sponsor a professional with an advanced degree or its equivalent for lawful permanent resident status.

The Director, Texas Service Center, denied the petition. The Director concluded that the Beneficiary did not possess the minimum educational credentials required for the offered position.

The matter is now before us on appeal. On appeal the Petitioner asserts that the Beneficiary's possession of the foreign equivalent of a U.S. bachelor's degree and 5 years of progressive experience in the specialty qualifies him for the offered position. However, as will be discussed, the ETA Form 9089, Application for Permanent Employment Certification (labor certification), does not state that such a combination of education and experience may qualify for the offered position.

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

I. LAW

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved 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 may 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 a labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certifies 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).

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a 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). The priority date is the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

II. ANALYSIS

In these proceedings, we must determine whether the Beneficiary meets the requirements of the offered position certified by the DOL. We must also determine whether the Beneficiary qualifies 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").

A. The Beneficiary's Possession of the Required Educational Credentials

In this case, the petition's priority date is July 6, 2015, and the labor certification states the minimum requirements of the offered position of executive sales manager as a U.S. master's degree or a foreign equivalent degree in business administration, plus 36 months of experience in the job offered, as a market research analyst, or in a related occupation.[1] In part H.8 of the labor certification, the Petitioner explicitly stated that "No" alternate combination of education and experience was acceptable.

At issue is whether the Beneficiary has the minimum education required by the terms of the labor certification. 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).

The Beneficiary attested on the labor certification to his receipt of a master's degree in business administration from [redacted] in India in 2000. The record contains copies of a diploma

[1] Although the petition's priority date is July 6, 2015, the Beneficiary seeks to use the October 7, 2009, priority date of a prior petition filed on his behalf by a former employer. *See* 8 C.F.R. § 204.5(e) (entitling a beneficiary of multiple petitions to the earliest priority date).

and transcript from the university, indicating the Beneficiary's receipt of a 2-year, master of business administration (MBA) degree on March 28, 2000. The record also contains a copy of the Beneficiary's 3-year, bachelor of arts degree from the same university, dated March 29, 1998.

The Petitioner submitted two expert evaluations of the Beneficiary's foreign educational credentials. Both evaluations state that the Beneficiary's Indian credentials equate to a U.S. bachelor's degree in business administration. The evaluations find that the Beneficiary's bachelor's degree is equivalent to 3 years of university study in the United States and that his master's degree is comparable to a U.S. bachelor's degree. Combining the Beneficiary's education with his employment experience of more than 5 years, the evaluations conclude that the Beneficiary possesses the equivalent of a U.S. MBA.

The evaluations refer to the regulatory definition of the term "advanced degree." An advanced degree means "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2). Based on this regulatory definition, the evaluations conclude that the Beneficiary possesses the equivalent of an advanced degree based on the foreign equivalent of a U.S. bachelor's degree followed by at least 5 years of progressive experience in the specialty.

We agree that the Beneficiary appears to possess the equivalent of an advanced degree based on his possession of a bachelor's degree and 5 years of post-baccalaureate experience. However, the labor certification does not allow for the equivalent of an advanced degree to qualify for the offered position. Rather, the labor certification states that the offered position requires an actual advanced degree: a U.S. master's degree or a foreign equivalent degree. Part H.8 of the labor certification explicitly states that "No" alternate combination of education and experience is acceptable.

The Beneficiary must meet the terms of the labor certification in order to establish eligibility. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. at 159; *Matter of Katigbak*, 14 I&N Dec. at 49. In this case, the labor certification clearly requires a master's degree or foreign equivalent degree and does not allow for an alternative combination of education and experience. As noted, the evaluations submitted conclude that the Beneficiary's foreign bachelor's degree equates to 3 years of U.S. university study and that his foreign master's degree equates to a U.S. bachelor's degree. The evaluations do not assert that the Beneficiary has a U.S. master's degree or foreign equivalent degree, as is required by the terms of the labor certification. Therefore, the record does not establish the Beneficiary's possession of the educational credentials required for the offered position.

On appeal, the Petitioner cites to *Chintakuntla v. INS*, No. C 99-5211 MMC, N.D. Cal. (May 4, 2000), asserting that it supports the Beneficiary's qualifications for the offered position. The Petitioner states that *Chintakuntla*:

> [E]stablishes that a foreign bachelor's degree and five years of experience **shall be accepted** as the equivalent of a U.S. master's degree for the purposes of EB-2 classification *regardless* of the educational and experience stipulations on the labor certification application. In other words, a beneficiary holding a foreign equivalent bachelor's degree and five years of experience can meet the educational requirement of a U.S. master's degree even if the labor certification does not indicate that a bachelor's degree and five years of experience [i]s an acceptable alternative.

(emphasis in original).

However, *Chintakuntla* does not bind us in this matter. First, U.S. district court decisions bind only their parties, even if published and in the same district. *Matter of K-S-*, 20 I&N Dec. 715, 718 (BIA 1993) (citations omitted). Also, the Beneficiary is not a member of the class certified in *Chintakuntla*, which includes beneficiaries of petitions for advanced degree professionals pending before the former Immigration and Naturalization Service (INS) on March 20, 2000, or decided between July 1, 1997, and March 20, 2000. *Chintakuntla*, No. C 99-5211 MMC, at **8-9.

In addition, the Petitioner misunderstands *Chintakuntla*'s ruling. There, the U.S. district court ordered the former INS to reconsider petitions for advanced degree professionals that it may have mistakenly denied. *Id.* at *9. Those petitions were accompanied by labor certifications requiring bachelor's degrees and at least 5 years of experience for the offered positions. *Id.* at *8. The former INS did not recognize that beneficiaries who met the requirements of those labor certifications may qualify for classification as advanced degree professionals.

Contrary to the Petitioner's assertion, the court in *Chintakuntla* did not instruct the INS to disregard the educational and experience requirements of labor certifications. Rather, the court identified petitions accompanied by labor certifications requiring bachelor's degrees and at least 5 years of experience and ordered the INS to consider those cases for advanced degree classification, if the beneficiaries met the requirements listed on the labor certifications. *Chintakuntla* therefore does not support the Petitioner's assertion that the Beneficiary qualifies for the offered position regardless of the requirements listed on the labor certification.

The Petitioner also asserts that "the statute, regulations, [and] policy memos do not require that the labor certification include language accepting a bachelor's degree plus five years of experience before the alien beneficiary can be considered an advanced degree professional." This is correct; however, the issue here is not whether the Beneficiary may be considered an advanced degree professional, but whether the Beneficiary has the education required for the offered position as that requirement was expressed on the labor certification. Here, the labor certification requires a master's degree or foreign equivalent degree, which, as was discussed, the Beneficiary does not have.

Also on appeal, the Petitioner cites a January 9, 2004, non-precedent decision of ours, which found that a foreign national with the equivalent of a U.S. bachelor's degree and 5 years of experience met

the accompanying labor certification's requirements of a "Master's or equivalent" degree. First, we are not bound by our non-precedent decisions. 8 C.F.R. § 103.10(b) (stating that only precedent decisions bind USCIS employees). Moreover, we do not find the decision cited by the Petitioner to be persuasive. We note that the 2004 case involved a labor certification on former Form ETA 750, Application for Alien Employment Certification. Form ETA 750 did not ask an employer to specify the nature of a degree equivalency or explicitly ask the Petitioner if it would accept an alternate combination of education and experience. Unlike the 2004 case, the case before us now involves an ETA Form 9089. Part H.8 of ETA Form 9089 unequivocally asks: "Is there an alternate combination of education and experience that is acceptable?" If so, the form instructs an employer to specify the alternate combination. As previously indicated, the Petitioner stated "No" in response to Part H.8, indicating that no alternate combination, including a bachelor's degree and 5 years of experience, was acceptable.

As previously indicated, in interpreting the requirements of an offered position, U.S. Courts of Appeal require us to examine the plain language of a labor certification. *See Irvine*, at 1009; *Madany*, at 1012-13; *Stewart*, at 3. Here, the labor certification clearly requires a master's degree and indicates that the Petitioner will accept no other combination of education and experience. The plain language of the labor certification therefore does not allow a beneficiary with a baccalaureate equivalency and 5 years of experience to qualify for the offered position.

In addition, copies of advertisements of the offered position placed during the labor certification process do not support the Petitioner's assertion. The advertisements state the offered position's requirements as an MBA and 3 years of experience. The advertisements do not indicate the Petitioner's acceptance of a bachelor's degree plus 5 years of experience in lieu of a master's degree. The ads indicate that the Petitioner did not notify U.S. workers with bachelor's degrees and more than 5 years of experience of their eligibility for the offered position.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the educational credentials required for the offered position as specified on the labor certification. Therefore, we will affirm the Director's decision and dismiss the appeal.

B. The *Bona Fides* of the Job Opportunity

Although not addressed by the Director, upon reviewing the record, we discovered evidence that raises concerns about the *bona fides* of the job opportunity.

A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8).[2] This attestation "infuses the recruitment process with

[2] We may deny a petition accompanied by a labor certification that does not comply with DOL regulations. *See, e.g., Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) (affirming the denial of a petition accompanied by a labor certification invalid for the intended, geographic area of employment).

the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*) (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

> Where the alien for whom alien labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity.

Id. A relationship between a petitioner and a beneficiary triggering concerns about the *bona fides* of a job opportunity "is not only of the blood; it may also be financial, by marriage, or through friendship." *Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000).

To determine the *bona fides* of a job opportunity, we must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding an offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest it; is involved in its management; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated on an accompanying labor certification. *Modular Container*, 1991 WL 223955 at *8. We must also consider whether a foreign national's pervasive presence and personal attributes would likely cause a petitioner to cease operations in the foreign national's absence, and whether the employer complied with DOL regulations and otherwise acted in good faith. *Id.*

In this case, government records indicate a business relationship between the Beneficiary and the Petitioner's sole member before the Beneficiary began working for the Petitioner in the offered position on July 1, 2014. The records indicate that the Beneficiary and the Petitioner's principal were members in [redacted] a company established in Texas on November 13, 2009, and dissolved on November 21, 2010. *See* Tex. Comptroller of Pub. Accounts, Taxable Entity Search, at https://mycpa.cpa.state.tx.us/coa/ (accessed Jan 10, 2017).

In addition, the record identifies the Beneficiary as a member of a small group of employees. The Petitioner's Form I-140, Immigrant Petition for Alien Worker, and copies of tax records identify the Beneficiary as the Petitioner's sole employee. Thus, multiple *Modular Container* factors indicate that the offered position may not have been clearly available to U.S. workers.

Because the Petitioner was not previously notified of this derogatory information, it may not serve as grounds for denial. *See* 8 C.F.R. § 103.2(b)(16)(i). However, in any future filings in this matter, the Petitioner must submit additional evidence of the *bona fides* of the job opportunity. Pursuant to 20 C.F.R. § 656.17(l), additional evidence should include: copies of certificates of formation of the Petitioner and [redacted] lists of all the officers and shareholders of the respective companies, their titles and positions, and descriptions of their relationships to each other and the Beneficiary; a

financial history of the companies, including the total amounts of investment in them and the individual amounts of investment by each officer, member, the Beneficiary, and his spouse; the name of the business official of the Petitioner with primary responsibility for interviewing and hiring applicants, and the official(s) with control or influence over the hiring decision for the offered position.

III. CONCLUSION

The record does not establish the Beneficiary's possession of the minimum educational credentials required for the offered position as specified on the labor certification. Therefore, we will affirm the Director's decision.

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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-S-T- LLC*, ID# 102606 (AAO Jan. 19, 2017)