U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-, INC.

DATE: JAN. 23, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, software design and development business, seeks to employ the Beneficiary as a systems analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition, concluding that the Petitioner had not established that the Beneficiary possessed 60 months of experience in the job offered as required for the proffered position. Specifically, the Director held that the record did not establish that the Beneficiary's prior positions with the Petitioner could constitute qualifying experience for the job offered.

The matter is now before us on appeal. On appeal, the Petitioner states that the Beneficiary's experience as a programmer analyst within its organization constitutes qualifying experience for the position offered as a systems analyst. However, as discussed below, the ETA Form 9089, Application for Permanent Employment Certification (labor certification) does not allow the Beneficiary to use this experience with the Petitioner in order to qualify for the proffered position.

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

I. LAW

A U.S. employer may sponsor a foreign national for lawful permanent residence, which is a three-part process. First, the employer must obtain a labor certification from the U.S. Department of Labor (DOL) for certification that "there are not sufficient [U.S.] workers who are able, willing, qualified, and available" to perform the position offered where the beneficiary will be employed, and that the employment of the beneficiary will not "adversely affect the wages and working conditions of workers in the United States similarly employed." Section 212(a)(5)(A)(i) of the Act. The date the labor certification is accepted for processing by the DOL establishes the priority date, which determines when a visa is available for the beneficiary to adjust to lawful permanent status. *See* 8 C.F.R. § 204.5(d).

Second, the employer files a Form I-140, Immigrant Petition for Alien Worker, with the approved labor certification, to U.S. Citizenship and Immigration Services (USCIS). To demonstrate eligibility for the petition, the petitioner must establish that it has the ability to pay the proffered wage to the beneficiary under 8 C.F.R. § 204.5(g)(2), that the beneficiary and the proffered position meet the requirements for the classification requested, and that the beneficiary meets the terms of the labor certification (*See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r. 1977)).

Third, if USCIS approves the Form I-140 and a visa is available based upon the priority date, the foreign national may apply for an immigrant visa abroad, or if eligible, adjustment of status in the United States.

II. ANALYSIS

As noted, the Petitioner has filed a petition requesting advanced degree professional classification. The issue on appeal is whether the Beneficiary has the experience required by the terms of the labor certification that was filed in support of this petition. The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. at 159; *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The record of proceedings contains a labor certification, approved by the DOL for the position of systems analyst. The labor certification was accepted by DOL on March 19, 2015, the priority date. Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in any Technology or related field.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: Any Management or related field.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

Therefore, the plain language of the labor certification states that the minimum requirements of the job offered are a bachelor's degree in any technology or related field or any management or related field, or the foreign educational equivalent degree, along with 60 months of experience in the job offered. According to the terms of the labor certification, experience in an alternate occupation is not accepted. Because the Petitioner filed the labor certification and the I-140 for an advanced

degree professional, the required 60 months of experience must be post-baccalaureate experience.[1] In this case, the Beneficiary was awarded a bachelor's degree or foreign equivalent degree on March 15, 2010.

Part K of the labor certification states that the Beneficiary has the following post-baccalaureate work experience:

- As a programmer analyst for the Petitioner beginning on October 15, 2012; and
- As a systems analyst/technical team analyst for [redacted] in [redacted], Pakistan, from March 16, 2010,[2] until September 1, 2012.

The record contains an experience letter from [redacted] confirming the Beneficiary's experience noted above, which constitutes 2 years, 5 months, and 17 days (901 days) of qualifying experience in the job offered.

At issue is whether the Beneficiary's experience as a programmer analyst with the Petitioner from October 15, 2012, onward can be used to constitute the remainder of qualifying experience in the proffered position needed for the Beneficiary to meet the terms of the labor certification.

In Part J.21 of the labor certification, the Petitioner stated that the Beneficiary did not gain any of the qualifying experience with the employer in a position that is "substantially comparable" to the job offered. The regulation at 20 C.F.R. § 656.17(i)(3) states the following:

> If the alien beneficiary already is employed by the employer . . . DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
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> > (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
> > (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

[1] 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).

[2] The Beneficiary began working for [redacted] on July 6, 2009; however, we may only consider experience gained after the Beneficiary was awarded his degree on March 15, 2010.

Therefore, the beneficiary may only rely upon experience gained with the petitioner if it is gained in a position that is not "substantially comparable" to the position offered. Under 20 C.F.R. § 656.17(i)(5)(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."

Concerning the Beneficiary's past employment with the Petitioner, the Petitioner submitted a letter indicating that the Beneficiary worked in its organization as a programmer analyst – Level 2 from October 15, 2012, until March 30, 2015, and as a programmer analyst – Level 3 from April 1, 2015, until the present time. As the priority date of the instant petition is March, 19, 2015, only the Beneficiary's experience with the Petitioner as a programmer analyst – Level 2, from October 15, 2012, until March 19, 2015, may be considered as qualifying experience.[3]

The Petitioner has submitted a chart specifying the differences between the job duties of the programmer analyst – Level 2 position and the proffered position of systems analyst. The Petitioner states that the programmer analyst – Level 2 position is not "substantially comparable" to the position offered as required under 20 C.F.R. § 656.17(i)(5)(ii). However, the labor certification required 60 months of experience *in the job offered.* The Petitioner's assertion that the Beneficiary's experience as a programmer analyst is not "substantially comparable" to the position offered as a systems analyst means that this experience is not sufficient to constitute experience in the job offered. In other words, claiming that the prior position with the employer is not "substantially comparable" to the position offered precludes experience in the prior position from being considered as experience *in the job offered.* Therefore, it is unnecessary for us to determine whether the Beneficiary's experience as a programmer analyst is substantially comparable to the position offered as a systems analyst. Even if the programmer analyst position was sufficiently distinct from the systems analyst position, the Petitioner would not have established that the Beneficiary had the required 60 months of experience in the *job offered*, as is required by the labor certification.

Moreover, we find that even if this experience were to be considered qualifying under the terms of the labor certification, it constitutes only 2 years, 5 months, and 4 days (885 days) of experience, which, when added to the 2 years, 5 months, and 17 days (901 days) of experience gained with [redacted] is not sufficient to establish that the Beneficiary has 60 months of experience in the job offered.

Therefore, we find that the Beneficiary does not possess the 60 months of experience in the job offered, as was required by the terms of the labor certification.

[3] In the experience letter, the Petitioner reports two different start dates (September 2, 2012, and October 15, 2012) for the Beneficiary. The Petitioner has not resolved this inconsistency with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As the labor certification reported a start date on October 15, 2012, that is the date we used for our calculations.

III. CONCLUSION

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the 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 M-, Inc.*, ID# 96353 (AAO Jan. 23, 2017)