U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-T-, INC.

DATE: JULY 26, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a software consulting business, seeks to employ the Beneficiary as a middleware/network administrator. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. *See* 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 Texas Service Center denied the petition. We dismissed the Petitioner's appeal,[1] concluding that the job offer did not qualify for classification of the Beneficiary as a professional. We also found that the Petitioner had not established that the Beneficiary possessed the minimum work experience required by the job offer. Our decision noted that the record did not contain the Petitioner's 2015 or 2016 federal income tax returns, and that updated financial records would be necessary to establish its continuing ability to pay the proffered wage to the Beneficiary.

On motion to reopen and reconsider, the Petitioner asserts that the primary academic requirements of the job offer qualify for third preference classification as a professional, and that the alternative academic requirements of the job offer qualify for third preference classification as a skilled worker. The Petitioner asserts that while the Beneficiary's employment documentation contained a typographical error, the evidence was still sufficient to establish that he possessed the experience required by the job offer. Finally, the Petitioner submits a copy of its 2015 federal income tax return and copies of several of the Beneficiary's paystubs from 2015 and 2016.

Upon review, we will deny the motion.

I. MOTION REQUIREMENTS

The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and state that a motion to reopen must state new facts and be supported by documentary evidence.

[1] *Matter of J-T-, Inc.*, ID #311728 (AAO Mar. 13, 2017).

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

On motion to reopen, the Petitioner submits additional evidence in an attempt to establish its ability to pay the proffered wage and demonstrate that the Beneficiary has the required experience. However, as discussed below, the newly submitted evidence does not overcome the grounds for dismissal and establish eligibility for the benefit sought. Therefore, the motion to reopen must be denied.

On motion to reconsider, the Petitioner asserts that we erred in comparing the job offer against the requirements for classification as a professional, instead of comparing it against the requirements for classification as a skilled worker. The Petitioner further asserts that our examination of the Beneficiary's work experience was "based on an overly strict scrutiny of the experience letter." As detailed below, while the Petitioner disagrees with our conclusions concerning the classification of the position and the Beneficiary's experience, its assertions do not identify any specific misapplication of law or policy and are not supported by any pertinent precedent decisions, regulations, statutes, or statement of policy. As the motion to reconsider does not establish that our prior decision was based on an incorrect application of law or policy, it must be denied.

A. Classification as a Professional

The job offer portion of the labor certification underlying a petition for classification as a professional "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i). In this case, the Petitioner stated in section H of the labor certification that the offered job requires a bachelor's degree in electronics and communication engineering plus 24 months of experience in the offered job. However, the Petitioner also indicated that, in the alternative, candidates with no college degree could qualify for the job if they had four years of experience in the offered job.

On motion, the Petitioner asserts that there "is no provision that precludes a 'professional' from qualifying for 'skilled worker' under 203(b)(3)(A)(i) of the Act." However, as stated in our previous decision, the Petitioner did not petition for classification of the Beneficiary as a skilled worker, but rather for classification of the Beneficiary as a professional under 203(b)(3)(A)(ii) of the Act. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Therefore, the petition must be adjudicated based on the regulatory requirements for classification as a professional.

A petition for classification as a professional must be supported by a job offer that requires a minimum of a bachelor's degree. The current job offer states that candidates could qualify for the position with no college degree. Therefore, regardless of the credentials of this particular Beneficiary, we must conclude that the offered job does not qualify to classify a beneficiary as a professional.

B. The Beneficiary's Employment Experience

The Petitioner must demonstrate that the Beneficiary meets all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The terms of the labor certification require at least two years of experience in the offered job of middleware/network administrator. The Petitioner submitted an employment letter on [redacted] letterhead. As discussed in our previous decision, the letter describes the Beneficiary's employment there between May 27, 2007, and July 23, 2009, and refers to the Beneficiary's position as both a middleware administrator and as a software engineer.

In our previous decision we noted this discrepancy and also noted that the signature of the employment letter's signatory was illegible. We advised the Petitioner that it must resolve this inconsistency with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). On motion, the Petitioner states that the discrepancy regarding the Beneficiary's job title was a typographical error, but it did not submit any objective evidence to explain the error and to clarify the Beneficiary's job title. Without additional explanation or documentation, we cannot find the letter to be sufficient evidence that the Beneficiary has at least two years of experience in the job offered.

Based on the foregoing, we affirm our previous conclusion that the submitted employment letter does not establish that the Beneficiary possesses the minimum experience required by the labor certification.

C. Petitioner's Ability to Pay the Proffered Wage

The Petitioner must also demonstrate its ability to pay the proffered the proffered wage to the Beneficiary beginning on the priority date and continuing until the Beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The priority date in this case is March 15, 2016. We noted in our prior decision that the Petitioner had not submitted the regulatory-required annual report, federal income tax return, or audited financial statement for 2016, and stated that if the Petitioner pursued this matter further, it would need to submit updated financial records to establish its continuing ability to pay the proffered wage to the Beneficiary from the 2016 priority date onward.

On motion, the Petitioner submits a copy of its 2015 federal income tax return and states that its 2016 tax return "is not yet due and has not been finalized." The Petitioner submits copies of paystubs from 2016 and 2017 and states that the wages paid to the Beneficiary in 2016 are "almost same as the wage required by the [labor certification]." We note that the proffered wage is $79,019.00 and that the Beneficiary's final paystub for 2016 shows gross annual wages of $74,420.80. Thus, if the Petitioner pursues this matter further it will need to submit updated financial records to establish its ability to pay the difference between the proffered wage and the wages actually paid to the Beneficiary in 2016, that is, $4,598.20. Based on the documentation currently in the record, the Petitioner has not established its ability to pay the proffered wage from the priority date onward.

D. Specific Skills Required by the Labor Certification

We further find that the record does not establish the Beneficiary's possession of the skills required by the labor certification. As noted, 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. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. at 158; *see also Matter of Katigbak*, 14 I&N Dec. at 49. The Petitioner specified at line H.14 of the labor certification that the offered job required candidates to possess the following specific skills: "DNS, LDAP, FTP, Remote Access, Security Management and System Troubleshooting skills, Installed and Configured Load Balancer to remove SPOF on WebServers using XML Config tool. Wsadmin, Shell, JACL and Jython scripting."

Although the employment letter from [redacted] lists numerous technical skills utilized by the Beneficiary during his employment there, the letter does not list any of the specific skills required by the terms of the labor certification. No other documentation was submitted to establish that the Beneficiary has the skills required for the offered position. As such, the Petitioner has not established that the Beneficiary meets the terms of the labor certification.

III. CONCLUSION

The offered job does not require at least a bachelor's degree, as is required to support a request for professional classification. In addition, the Petitioner has not established that the Beneficiary possesses the experience required by the labor certification or that it has the continuing ability to pay the proffered wage from the priority date onward. Finally, the Petitioner has not established that the Beneficiary possesses the specific skills required by the labor certification.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of J-T-, Inc.*, ID# 591938 (AAO July 26, 2017)