U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-I-, INC.

DATE: JULY 30, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a manufacturer and wholesaler of grills, seeks to employ the Beneficiary as vice president of finance. It requests his classification under the third-preference, immigrant category as a professional. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a bachelor's degree.

The Director of the Nebraska Service Center denied the petition. The Director concluded that, contrary to the requirements of the offered position and the requested classification, the Petitioner did not demonstrate the Beneficiary's possession of a U.S. baccalaureate or foreign equivalent degree.

On appeal, the Petitioner contends that it demonstrated the Beneficiary's educational qualifications for the job and the classification. It submits one of our non-precedent decisions, asserting that we "reversed" a federal court decision cited by the Director.

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

I. EMPLOYMENT-BASED IMMIGRATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, immigration as a professional follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain 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). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the

requirements of a DOL-certified position and the requested visa classification. If USCIS grants a petition, a foreign national may finally 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.

II. THE REQUIRED EDUCATION

A petition for a professional must demonstrate that an offered position requires, and that a beneficiary has, at least a U.S. baccalaureate or a foreign equivalent degree. 8 C.F.R. §§ 204.5(l)(3)(i), (ii)(C). This regulatory requirement means a single degree - uncombined with training, other education, or experience - that either is, or equates to, a U.S. bachelor's degree. *See* Final Rule for Employment-Based Immigrant Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (stating that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification . . ., *an alien must have at least a bachelor's degree*") (emphasis added).

A petitioner must also demonstrate a beneficiary's possession, by a petition's priority date, of all DOL-certified job requirements of an offered position. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the accompanying labor certification states the minimum requirements of the offered position of vice president of finance as a U.S. bachelor's degree or a foreign equivalent degree in accounting or finance, and five years of experience in the job offered or as a finance director. The Beneficiary's qualifying experience is not at issue.

On the labor certification, the Beneficiary attested that, by the petition's priority date, a South African university awarded him a bachelor's degree in accounting. The Petitioner provided copies of a degree and transcript from the university. The materials indicate that the Beneficiary earned a three-year, bachelor of commerce degree with a concentration in accounting sciences. The Petitioner also submitted an independent evaluation of the Beneficiary's foreign credentials. The evaluation states that the Beneficiary's degree equates to three years of U.S. college or university studies. Based on a combination of the Beneficiary's degree and employment experience, however, the evaluation concludes that he has the equivalent of a U.S. bachelor's degree in business administration with a concentration in accounting.

The Petitioner contends that the Beneficiary's credentials and the evaluation demonstrate that he has the foreign equivalent of a U.S. bachelor's degree in accounting and meets the minimum educational requirements of the offered position and the requested classification. But on the labor certification, the Petitioner indicated that the offered position requires a U.S. baccalaureate or a foreign equivalent

[1] This petition's priority date is February 15, 2018, the date 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).

degree, uncombined with training, education, or experience. Part H.4. of the labor certification indicates the position's minimum educational level as a U.S. "Bachelor's" degree, and part H.9. states the Petitioner's acceptance of a foreign equivalent degree. Part H.8. states that the Petitioner will not accept "an alternate combination of education and experience." The Petitioner claims that the position does not require a U.S. bachelor's degree or a single foreign degree equating to one. But the language of the labor certification does not support the Petitioner's assertion. The Petitioner did not check the box for "Other" in part H.4. and specify in part H-4A. that it would accept a combination of education and experience as the equivalent of a U.S. bachelor's degree. Nor did the Petitioner indicate its acceptance in part H.9. of "an alternate combination of education and experience." The Petitioner also did not state its acceptance in part H.14., "Specific skills and other requirements," of a combination of education and experience. Instead, the plain language of the labor certification states that the position requires at least a U.S. baccalaureate or a foreign equivalent degree. The evaluation submitted by the Petitioner equates the Beneficiary's degree to only three years of U.S. college or university studies. A U.S. bachelor's degree typically requires four years of post-secondary studies. *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977). The record therefore does not demonstrate the Beneficiary's possession of the minimum education required for the offered position.

Additionally, the Petitioner has not demonstrated the Beneficiary's possession of a single degree that is, or equates to, a U.S. baccalaureate as required for classification as a professional. *See, e.g.,* 8 C.F.R. § 204.5(l)(2) (stating that a "professional" must have "a United States baccalaureate degree or a foreign equivalent degree"). Thus, the record also does not establish the Beneficiary's possession of the minimum education required for the requested classification.

To support the finding that the Petitioner did not demonstrate the equivalency of the Beneficiary's three-year, foreign bachelor's degree to a U.S. baccalaureate, the Director's notice of intent to deny the petition cited a federal court decision. *See Sunshine Rehab Servs., Inc. v. USCIS*, No. 09-13605, 2010 WL 3325442 (E.D. Mich. Aug. 20, 2010). On appeal, the Petitioner submits a copy of one of our 2012, non-precedent decisions, asserting that we "subsequently reversed" the denial in *Sunshine Rehab*. Our 2012 decision, however, concerns a different petition than the one the court addressed in *Sunshine Rehab*. Our decision therefore does not reverse the court's ruling. Rather, the Petitioner apparently asserts that our 2012 decision reaches a different conclusion than the *Sunshine Rehab* court.

Our 2012 decision, however, is distinguishable from *Sunshine Rehab*. There, the court upheld USCIS' conclusion that a Pakistani bachelor's degree constituted a three-year, academic degree and that the combination of the degree and a one-year internship did not meet the minimum educational requirement for classification as a professional. *Sunshine Rehab*, *supra*, at **6-9. In contrast, our 2012 decision found that a *diplome d'etudes superieures specialisees* from a French university equated to a U.S. master's degree and qualified the beneficiary for the requested classification of advanced degree professional under section 203(b)(2)(A) of the Act. Thus, unlike *Sunshine Rehab*, our 2012 decision did not consider the U.S. equivalency of a three-year, foreign bachelor's degree and did not even involve a request for classification as a professional. Therefore, contrary to the Petitioner's assertion, our 2012 decision does not support a finding that the Beneficiary's three-year degree equates to a U.S. baccalaureate.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum education required for the offered position and the requested classification. We will therefore affirm the petition's denial.

III. 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 of the offered position. 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). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of vice president of finance as $95,000 a year. As previously noted, the petition's priority date is February 15, 2018.

The Petitioner submitted copies of its federal income tax returns for 2015 and 2016. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks required evidence of the Petitioner's ability to pay the proffered wage in 2018, the year of the petition's priority date.

Also, USCIS records indicate the Petitioner's filing of immigrant petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and any of its other petitions that were pending or approved as of this petition's priority date of February 15, 2018, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming revocation of a petition's approval where, as of the grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

USCIS records indicate that the Petitioner filed at least one other I-140 petition for another beneficiary that was approved as of February 15, 2018.[3] Thus, in any future filings in this matter, the Petitioner must provide the proffered wage and priority date of its other petition. It may also submit additional evidence of its ability to pay the petitions' combined proffered wages, including proof of any wages it paid to the beneficiaries in 2018 and materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). In addition, the Petitioner must submit copies of an annual report, federal tax return, or audited financial statement for 2018.

[2] The Petitioner need not demonstrate its ability to pay the proffered wages of petitions that it withdrew or, unless pending on appeal, that USCIS denied, revoked, or rejected. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of their corresponding petitions, or after their corresponding beneficiaries obtained lawful permanent residence.

[3] USCIS records identify the other petition by the receipt number [redacted].

IV. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum experience required for the offered position or the requested classification. We will therefore affirm the petition's denial. 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 N-I-, Inc.*, ID# 5377206 (AAO July 30, 2019)