U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-, INC.

DATE: JUNE 28, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of management consulting services, seeks to employ the Beneficiary as a senior software developer. 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 with at least a bachelor's degree for lawful permanent resident status.

The Acting Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not establish the Beneficiary's possession of the experience and skills required for the offered position.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary gained all required experience and skills with it and a former U.S. employer. It contends that the Director disregarded evidence of the unavailability of a letter from the former employer. It also asserts that the Beneficiary's possession of a master's degree satisfies the position's primary requirements of a bachelor's degree and five years of experience.

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

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first 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 a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, an employer must next submit the 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 considers whether a Beneficiary meets the DOL-certified requirements of a position. If USCIS approves 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 REQUIREMENTS OF THE OFFERED POSITION

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] When evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum requirements of the offered position. 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 the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of senior software developer as a bachelor's degree in computer science or engineering, and five years of experience in the job offered. Part H.14 of the labor certification also states that experience must include three years of proficiency with certain operating systems and tools, and five years of software development experience using specified skills and technologies. In addition, the labor certification states that the Petitioner will not accept any alternate combination of education and experience.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than six years of full-time qualifying experience in the United States. He stated that he worked for the Petitioner in the offered position for almost three and a half years and that prior to employment with the Petitioner, he worked for a software company as an engineer for nearly three years. His educational qualifications are not at issue. However, for reasons discussed below, we agree with the Director that the Petitioner has not established the Beneficiary's possession of five years of experience in the job offered, five years of experience using the specified skills and technologies, or three years of experience demonstrating proficiency with the listed operating systems and tools.

A petitioner must generally support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). In response to the Director's request for additional evidence (RFE), the Petitioner provided letters from two people who stated that they worked with the Beneficiary at the software company. The record also contains copies of the Beneficiary's payroll records with the company in 2013 and information about the company and its products.

The letters are not on the software company's stationery. As the Petitioner argues, however, it submitted evidence of the company's acquisition by another firm that eventually went out of business. The record therefore establishes the unavailability of a company letter. *See* 8 C.F.R.

[1] This petition's priority date is April 4, 2017, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

§ 204.5(g)(1) (requiring us to consider other documentation if a letter from a former employer is unavailable).

The letters, however, are insufficient to establish the Beneficiary's claimed qualifying experience. The record lacks corroborating evidence of the co-workers' claimed affiliations with the software company, such as payroll records as submitted on behalf of the Beneficiary. The letters therefore are unreliable evidence of the Beneficiary's claimed qualifying experience. Also, neither of the letters states the Beneficiary's proficiency or experience with the technologies and skills specified in Part H.14 of the labor certification. The Petitioner argues that the information about the company and its products details the technologies and skills the Beneficiary used during his employment with the company. However, the Petitioner has not offered evidence of the Beneficiary's use of the skills and technologies discussed generally in the company information. Therefore, the record does not demonstrate that the Beneficiary gained qualifying experience or proficiency in the required skill set with the software company.

To support the Beneficiary's claimed qualifying experience with it, the Petitioner provided a letter on company stationery from its chief executive officer. The Petitioner's letter, however, also does not state the Beneficiary's proficiency or experience with the technologies and skills specified in Part H.14 of the labor certification. Thus, as the Director found, the record does not establish the Beneficiary's possession of the experience and skills required for the offered position.

In addition, a labor certification employer cannot rely on experience that a foreign national gained with it, unless he or she gained the experience in a position substantially different than the one offered or the employer can demonstrate the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). For these purposes, a substantially different position means a job that requires performance of the same duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5). Here, the Petitioner attempts to rely on the Beneficiary's experience with it. However, the Petitioner states that the Beneficiary's experience with it was gained in the exact same position as offered. The record also lacks evidence of the impracticality of training a U.S. worker for the offered position. Thus, the record does not establish that the Petitioner can rely on the Beneficiary's qualifying experience with it.

On appeal, the Petitioner argues that the experience letters from it and the Beneficiary's former co-workers "incorporate" the job duties of the offered position and the skills and technologies specified on the labor certification. The letters, however, do not state that purported incorporation. The letters must describe the Beneficiary's job duties, and specify the skills and technologies with which he worked. As they do not, they are not sufficient to demonstrate the Beneficiary's eligibility.

The Petitioner also notes that the Beneficiary has a master's degree and that a bachelor's degree followed by five years of experience can equate to a master's degree. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" for purposes of qualifying as an advanced degree professional under section 203(b)(2)(A) of the Act). The Petitioner therefore argues that the Beneficiary's

master's degree equates to a bachelor's degree and five years of experience, qualifying him for the offered position.

The Petitioner's argument, however, is misplaced. The advanced degree equivalency applies only for purposes of qualifying a beneficiary for an immigrant visa classification. In addition to demonstrating a beneficiary's qualifications for a requested classification, a petitioner must establish his or her possession of the minimum requirements stated on an accompanying labor certification. *See Matter of Wing's Tea House*, 16 I&N Dec. at 160. Thus, even if the advanced degree equivalency qualified the Beneficiary for classification purposes, the Petitioner would still have to establish his possession of at least a bachelor's degree and five years of experience as stated on the labor certification.

The Petitioner argues that *Wing's* and a prior case with a similar holding, *Matter of Katigbak*, 14 I&N Dec. 45 (Comm'r 1971), are distinguishable from this matter. The Petitioner contends that *Katigbak* and *Wing's* focused on qualifications of beneficiaries for requested classifications, while the Beneficiary's eligibility as a professional is not at issue. Contrary to the Petitioner's argument, however, *Katigbak* and *Wing's* hold that a petitioner must establish a beneficiary's possession of the minimum job requirements stated on a labor certification. The precedent cases therefore apply to this matter.

Finally, the Petitioner asserts that the Beneficiary's graduate coursework establishes his possession of the skills and technologies required for the offered position. Part H.14 of the labor certification, however, requires three years of "proficiency" with certain skills and technologies, and five years of "experience" with other skills and technologies. The record neither establishes the Beneficiary's graduate coursework as totaling the requisite three or five years, nor demonstrates that the terms of the labor certification allow coursework as constituting "proficiency" or "experience."

For the forgoing reasons, the record does not establish the Beneficiary's qualifications for the offered position.

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.[2] 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 income tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of senior software developer as $98,363 a year. As previously noted, the petition's priority date is April 4, 2017.

[2] The Director's RFE asserted that the record did not establish the Petitioner's ability to pay. But the RFE did not describe any deficiencies in the Petitioner's evidence, nor did the Director deny the petition on ability-to-pay grounds.

The Petitioner submitted copies of its federal income tax returns for 2015. Contrary to 8 C.F.R. § 204.5(g)(2), however, the Petitioner did not submit required evidence of its ability to pay the proffered wage in 2017, the year of the petition's priority date. The record therefore does not establish the Petitioner's ability to pay the proffered wage. For this additional reason, the petition may not be approved.

IV. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum experience and skills required for the offered position, nor does it demonstrate the Petitioner's ability to pay the proffered wage. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of S-, Inc.*, ID# 1442174 (AAO June 28, 2018)