U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-C-S-, INC.

DATE: MAR. 19, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner,[1] a software development company, seeks to employ the Beneficiary as a software engineer. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(B)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The petition was initially approved. The Director of the Texas Service Center subsequently revoked the approval, finding that the Petitioner and the Beneficiary had not resolved evidentiary inconsistencies concerning the Beneficiary's prior work experience and that the Beneficiary did not meet the minimum requirements of the labor certification because the Petitioner had not established that the Beneficiary had the requisite education and experience specified on that document. The Director also invalidated the labor certification based on a finding of willful misrepresentation of a material fact in regard to the Beneficiary's qualifications.

On appeal the Petitioner asserts that the evidentiary issues concerning the Beneficiary's employment history have been resolved, that the evidence of record establishes that the Beneficiary meets the minimum work experience and educational requirements of the labor certification, and that there was no proper basis for the finding of willful misrepresentation of a material fact.

Upon *de novo* review, we will remand the case to the Director for further consideration and the entry of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section

[1] The petition was filed by [redacted] of [redacted] Maine, which subsequently merged with [redacted] under an agreement dated December 31, 2008, effective January 22, 2009, with [redacted] as the surviving entity.

212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the 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.

Section 205 of the Act 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c).

II. ANALYSIS

At issue in this case are whether the evidence of record establishes that the Beneficiary meets the minimum experience and education requirements of the labor certification, whether the Petitioner or the Beneficiary willfully misrepresented any material facts regarding the Beneficiary's education or employment history, and whether the record supports the invalidation of the labor certification.

The petition was initially approved in December 2007, but the Director issued a notice of intent to revoke (NOIR) in December 2015. After receiving the Petitioner's response to the NOIR, the Director issued a decision revoking the approval of the petition. In his decision the Director cited another Form I-140, Immigrant Petition for Alien Worker, filed by the Petitioner on behalf of the Beneficiary in 2011[2] in which the accompanying labor certification (an ETA Form 9089) contained information about the Beneficiary's employment history that conflicted with the information provided on the labor certification substitution accompanying the first petition. The Director also found that the Beneficiary's three-year bachelor's degree in applied science did not meet the labor certification's field of study requirement and was not equivalent to a U.S. bachelor's degree. The Director concluded, therefore, that the Petitioner did not establish that the Beneficiary met the minimum requirements of the labor certification. In addition, the Director found that the misrepresentations of the Beneficiary's qualifications were willful and material to the issue of his eligibility for the requested immigrant classification, and on that basis invalidated the labor certification.

[2] That petition (receipt number [redacted]), seeking advanced degree professional classification for the Beneficiary, was denied.

We do not agree with the Director's analysis of the education and experience issues, or the rationales for his conclusions. However, the petition is not approvable as there remain many evidentiary inconsistencies in the record. Therefore, we will remand the case for further consideration of the Beneficiary's qualifications, as well as the issues of whether the Petitioner and the Beneficiary willfully misrepresented any material facts and whether the labor certification should remain invalidated.

A. Beneficiary's Experience

A beneficiary must meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date.[3] *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The priority date in this case is December 15, 2004. The labor certification (a Form ETA 750) states that the minimum education required for the job offered is a "bachelor's deg. or equiv." in the field of computer science, information systems, science, or engineering. It also states that the minimum experience required is 24 months in the job offered or in a programming or programmer analyst position.

We begin by reviewing the Beneficiary's employment history as listed on the two labor certifications: the labor certification substitution, Form ETA 750B, signed by the Beneficiary on July 9, 2007, and the subsequent labor certification, Form ETA 9089, signed by the Beneficiary on August 25, 2011. In his revocation decision the Director discussed the conflicting information in the two labor certifications regarding the Beneficiary's employment during the years 2005-2007. The Director noted that if the Beneficiary's employment with began in May 2005, as listed on the Form ETA Form 750B, then the ETA Form 9089 listing his employment as starting on August 1, 2006, is incorrect. The Director also noted that the job with listed on the Form ETA 750B, was omitted from the ETA Form 9089 and that the employment dates claimed on the ETA 750B for overlapped the employment dates with claimed on the ETA 9089. He further noted that due to the location of in Maine and in Georgia it appeared unlikely that the Beneficiary was truly employed by both companies at the same time.[4] Based on these inconsistencies the Director found that USCIS could not determine that

[3] The "priority date" of a petition is the date the underlying labor certification was filed with the DOL. *See* 8 C.F.R § 204.5(d).

[4] The Petitioner asserts that the employment history as listed on the Form ETA 750B signed by the Beneficiary in July 2007 is correct,[4] except for a typographical error in the "date started" box for the job with which read May 2005 instead of May 2007. Considering all of the other jobs on the Form ETA 750B were listed in reverse chronological order, we find this explanation for the entry of May 2005 instead of May 2007 as the starting date for the job to be plausible. The Director does not appear to have taken the possibility of a typographical error into consideration, and may wish do so on remand. While the Form ETA 750B is chronologically consistent if May 2007 is accepted as the starting date for the Beneficiary's employment, the record still contains conflicting evidence of his employment history in 2006 and 2007. Other documents pointing to May 2007 as the starting time for the employment include the Form G-325A, Biographic Information, signed by the Beneficiary in August 2007 in conjunction with his adjustment of status application (Form I-485) with USCIS, which listed employment as a software engineer with starting in May 2007 as his most recent job. The record also includes copies of the Beneficiary's Forms W-2, Wage and Tax Statements, for the years 2006 and 2007 which are consistent with the

the Beneficiary had the requisite work experience to qualify for the job offered, and that the Petitioner and the Beneficiary had willfully misrepresented material facts about the Beneficiary's qualifications.

The Director's finding that the Beneficiary's qualifying work experience had not been established was based exclusively on the inconsistent employment histories for the years 2005-2007. Employment during those years was after the priority date and would not count as qualifying experience in any event. Since the priority date of this petition is December 15, 2004, only the experience gained by the Beneficiary up to that date could be considered as qualifying experience. Experience after the priority date is not material to the Beneficiary's qualifications for the job offered.

As listed on the Form ETA 750B, only the four jobs where the Beneficiary claims to have worked prior to December 2004, can be used as qualifying experience. The Director's revocation decision did not review the evidence relating to those four jobs, some of which was submitted with the original petition and formed the basis for the initial approval, and some of which was submitted with the second petition or in the current revocation proceedings. The evidence concerning the Beneficiary's claimed experience prior to December 2004 also contains inconsistencies. Regarding the alleged employment with it appears that the employment verification letter and the labor certification submitted with the original petition in 2007 describe very different job duties than the employment verification letter and the labor certification submitted with the second petition in 2011. As for the employment with the employment verification letter submitted with the second petition in 2011 is inconsistent with the employment agreement submitted in the current revocation proceedings with respect to the Beneficiary's dates of employment.

On remand the Director should review the entire record relating to the Beneficiary's employment experience, revisit the question of whether the evidentiary discrepancies in the record warrant a finding that all of the documentary evidence lacks probative value, and determine whether the Beneficiary has at least two years of qualifying experience. The Director should also assess whether there was any willful misrepresentation of the Beneficiary's experience that is material to this adjudication.

Beneficiary's claim on the Form ETA 750B to have worked for from September 2006 to April 2007 before starting work with However, the Forms W-2 from which appear to confirm that the Beneficiary was employed by that company in Georgia, for parts of 2006 and 2007, conflict with a letter from the president of dated August 3, 2009, stating that the Beneficiary's dates of employment with that company, located in Maine, were from August 1, 2006, to July 31, 2009. Neither the Petitioner nor the Beneficiary has provided any explanation for this evidence of simultaneous employment by two different companies with no geographical proximity to one another from September 2006 to April 2007.

B. Beneficiary's Education

The minimum educational requirement as stated in the labor certification is a "Bachelor's deg. or equiv." in the field of computer science, information systems, science, or engineering. As part of its initial evidence the Petitioner submitted documentation showing that the Beneficiary received a bachelor of applied science degree from in India, on June 21, 2000. The degree certificate and accompanying transcripts indicate that the academic program comprised three years of study featuring coursework in English, mathematics, physics, chemistry, engineering science, and a specialization in computer science. We find that the Beneficiary's curriculum satisfied the field of study requirement of the labor certification. However, the Beneficiary's degree from was awarded after completion of a three-year academic program, not a four-year program as is generally required for a bachelor's degree in the United States. See *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977).

On appeal the Petitioner does not contend that the Beneficiary's three-year degree from is equivalent to a U.S. bachelor's degree. It does contend that the combination of this degree and a "Professional Diploma in Software Technology & Systems Management" from India's granted to the Beneficiary on September 10, 2001, after completion of a two-year program of study, is equivalent to a U.S. bachelor's degree. In support of this claim the Petitioner cites the previously submitted evaluation from of , which evaluated the Beneficiary's three-year degree from as equivalent to three years of study at a U.S. college or university, the two-year professional diploma from as equivalent to 45 credits from a U.S. college or university, and the combination of those two credentials as equivalent to a four-year bachelor's degree in computer information systems from an accredited college or university in the United States.

In his revocation decision the Director found that the Beneficiary did not meet the labor certification requirement of a "Bachelor's deg. or equiv." because he "does not possess a single degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree." According to the Director, the wording of the labor certification means that the educational requirement cannot be met by a combination of credentials consisting of a three-year degree from a foreign university and a non-degree credential like the Beneficiary's professional diploma from That assertion would be true if the Petitioner were seeking professional classification for the Beneficiary, since the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states that "[i]f the petition is for a professional, [it] must be accompanied by evidence that the alien holds *a United States baccalaureate degree or a foreign equivalent degree*." (Emphasis added.) This petition, however, seeks skilled worker classification for the Beneficiary, as stated in a letter from the Petitioner that accompanied the original filing.[5]. The minimum requirements for skilled worker classification are two years of qualifying experience plus any education that may be specified on the labor certification. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B).

[5] The petition was filed on an old version of the Form I-140 which allowed a petitioner to file for professional or skilled worker classification and did not allow for the selection of one and not the other on the face of the document.

Skilled worker classification, therefore, does not require a U.S. bachelor's degree or a foreign equivalent degree unless the labor certification specifies that such a degree is required.

The Petitioner asserts that its wording of the minimum educational requirement on the labor certification – "Bachelor's deg. or equiv." – means that it would accept a combination of credentials which are equivalent to a U.S. bachelor's degree, as determined by an established educational evaluation service like We find that the labor certification language quoted above, stating the minimum educational requirement for the proffered position, is ambiguous. Additional evidence is needed to determine the Petitioner's intent with regard to the minimum educational requirement. On remand, therefore, the Director may request documentary evidence of the Petitioner's advertisements for the position, the applications that were received, how the Petitioner responded to them, and anything else that may be considered relevant.

We also note that two different credentials have been presented in these proceedings. The credential submitted with the petition in 2007 is called a "Title of in Systems Management," was issued on September 16, 2001 at India, and included transcripts which identified the Beneficiary's registration number as and listed coursework in four semesters of a "network-centered computing curriculum" labeled E, F. G, and H completed from January 12, 1999, to August 10, 2000, and two more semesters of "professional practice" labeled PP 1 and PP 2 completed in February and August 2001. The credential submitted with the appeal in 2017, however, is called a "Professional Diploma in Software Technology & Systems Management," was issued on September 10, 2001, in India, and included transcripts which identified the Beneficiary's registration number as and listed coursework in four semesters of a "software technology & systems management curriculum" labeled I, II, III, and IV completed between February 18, 2000, and August 18, 2001. In addition to the above described differences, none of the listed courses and number grades match up from one credential to the other.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.* On remand the Director may request an explanation from the Beneficiary as to why the record contains evidence of two different credentials from

III. CONCLUSION

For all of the reasons discussed above, we will withdraw the Director's decision and remand this case for further consideration of whether the Beneficiary meets the educational and experience requirements of the labor certification, whether the Petitioner or the Beneficiary willfully misrepresented any material facts concerning the Beneficiary's qualifications, and whether the record supports the invalidation of the labor certification. If deemed necessary, the Director may request additional evidence from the Petitioner. The Director shall then issue a new decision.

ORDER: The Director's decision is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of H-C-S, Inc.*, ID# 946934 (AAO Mar. 19, 2018)