U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30150629

Date: MAR. 27, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, an information technology solutions provider, seeks to employ the Beneficiary as a programmer 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 of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Beneficiary possesses the minimum requirements for the offered position as stated on the labor certification. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Immigration as an advanced degree professional usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant visa category, and that the employer has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a

labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. 8 C.F.R. § 204.5(d).

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1). An "advanced degree" is defined as:

> [A]ny 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. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

8 C.F.R. § 204.5(k)(2). An advanced degree professional petition must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

8 C.F.R. § 204.5(k)(3)(i). In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

In short, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. This means that the beneficiary must possess, and the offered position must require, either a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate; or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

II. ANALYSIS

The Petitioner indicated in Part H of the labor certification that the offered position of programmer analyst requires a master's degree in computer science or engineering and six months of experience in the job offered, or as a ColdFusion developer or ColdFusion application designer. In the alternative, an individual with a bachelor's degree and five years of work experience meets the minimum requirements for the position. As noted above, these requirements must be met by the petition's priority date, which in this case is September 6, 2012.

In Part K of the labor certification, the Beneficiary attested that he was employed by the Petitioner for more than 16 months in the offered position, and by N-G-T- for more than 30 months immediately prior as a programmer analyst. He also indicated in response to the question in Part J.21 that he did not gain any of the qualifying experience for the position while employed by the Petitioner in a position substantially comparable to the offered position.

After issuing a request for evidence (RFE) and reviewing the Petitioner's response, the Director determined in his decision that while the Petitioner had submitted evidence showing that the Beneficiary possesses a qualifying bachelor of science degree, it had not established that the Beneficiary possesses the required five years of work experience. He noted that the Beneficiary had attested to only 46 of the required 60 months of experience on the labor certification, and that a claim to possess work experience that is not so listed is less credible. *See Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976). The Director also pointed out that the instructions for the labor certification state that in addition to listing employment experience in the three years prior to filing the labor certification with DOL, section K should also show any other experience that qualifies the individual for the offered position. Ultimately, the Director concluded that the evidence of the Beneficiary's work experience, which includes letters and other evidence from employers not listed on the labor certification, was insufficient to establish his qualification for the offered position.

On appeal, the Petitioner asserts that the Director made errors of fact and law, and that the record establishes that the Beneficiary possesses the requisite 60 months of work experience in the job offered or in an alternative position as stated on the labor certification. It initially focuses on the 16 months of experience the Beneficiary gained with its organization immediately prior to the priority date, and asserts that his response to question J.21 "allows him to use his [Petitioner] experience before the LC was filed." However, while the Petitioner cites to the relevant DOL regulation, it does not address the issue of whether that experience was gained in a position that was not substantially comparable to the offered position.

An employer filing a labor certification cannot rely on an individual's experience gained with it to establish that they meet the minimum requirements for an offered position, unless the experience was in a job substantially different than the offered position or the employer demonstrates the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). For these purposes, a job is substantially different from an offered position if it requires performance of the same job duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

Here, the Beneficiary attested on the labor certification that his job duties as a programmer analyst with the Petitioner match those of the offered position with the same title. This is also supported by a new letter from the Petitioner, which confirms that the Beneficiary fulfilled those duties while working for two different clients. In addition, the Petitioner does not claim that it would be impractical to train a U.S. worker for the offered position. The record therefore does not support the Petitioner's use of experience that the Beneficiary gained with it towards establishing his qualifications for the offered position.

Turning to the work experience the Beneficiary gained while employed with N-G-T-, we agree with the Director that the evidence establishes that he gained 30 months of qualifying experience. As for

the additional 30 months required, the Petitioner asserts that the Beneficiary's experience with two other previous employers, C-L-L- and V-S-P-, account for an additional 15 months of qualifying experience. However, the Beneficiary did not list his experience with either of these employers in Part K of the labor certification. As previously noted, the omission of the Beneficiary's claimed experience from the labor certification application casts doubt on the experience's validity. *See Matter of Leung*, 16 I&N Dec. 12, 14-15 (Distr. Dir. 1976), *disapproved of on another ground by Matter of Lam*, 16 I&N Dec. 432 (BIA 1978) (finding a foreign national's claim of qualifying experience to lack credibility where he omitted the experience from a labor certification application).

To establish that the Beneficiary possesses the requisite employment experience, evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience.

Here, as evidence of the Beneficiary's experience with C-L-L-, the Petitioner submitted a letter from the company which states that he was a web developer and ABAP programmer from October 2006 to June 2007. His duties included creating reports, functional and technical specifications and supply chain planning using ABAP, and developing a reporting web portal using ColdFusion and SQL. The evidence also includes a "Salary Certificate" for the month of May 2007 which states that it was created for purposes of a loan, two pay statements for the months of November 2006 and January 2007, and the Beneficiary's income tax form for the period of April 2006 to March 2007, all of which verify his employment with C-L-L- during most of the period stated in the letter. This additional evidence is sufficient to overcome the negative credibility arising from this experience not being listed on the labor certification, and shows that he possesses an additional eight months of qualifying experience.

To support the Beneficiary's claimed qualifying experience with V-S-P-, the Petitioner submitted two letters. The first, dated July 29, 2013, states that the Beneficiary was employed as a Junior ABAP programmer from January 2004 to February 2005, and that from March 2005 until September 2006 the additional duties of a web developer were added to his responsibilities. The letter indicates that his duties included coding for existing ColdFusion web applications, running SQL database queries, working on implantation of ABAP reporting tools, and bug fixing and unit testing. A second letter, submitted with the Petitioner's RFE response, was not dated, and indicates that the Beneficiary worked as a senior SAP/ABAP programmer and a web application developer from March 2005 to September 2006, implementing a reporting tool with SAP/ABAP and ColdFusion during this period. The inconsistencies between the Beneficiary's position titles and dates of employment cast further doubt on the experience claimed under this employer. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Petitioner also submitted two partially illegible pay slips issued by V-S-P- to the Beneficiary which do not clearly show the periods they cover but appear to be for 80 hours, or two weeks, each. One states that discrepancies should be reported before May 5, 2006, and the other before October 5, 2006. Unlike the tax and payroll evidence submitted regarding the Beneficiary's experience with C-L-L-, this evidence lacks detail and appears to cover a much shorter portion of the claimed work

experience. Further, this evidence does not aid in resolving the discrepancies between the two experience letters from V-S-P-. Taking all of the factors noted above into consideration, we conclude that this evidence does not overcome the concerns raised by the Beneficiary's failure to list this claimed experience on the labor certification. So we will not consider his claimed employment with V-S-P- to be qualifying experience.

In addition to the evidence discussed above, the Petitioner also submitted evidence regarding the Beneficiary's employment with D-R-I-, as well as work experience for its clients that the Beneficiary accrued after the priority date for this petition. But the evidence for D-R-I- did not include a letter from this employer as required under 8 C.F.R. § 204.5(g)(1), nor was its absence explained. This employer also was not listed by the Beneficiary on the labor certification. This evidence is therefore insufficient to establish his qualifying employment with D-R-I-. Also, the Petitioner concedes that the Beneficiary's experience gained after the priority date is not qualifying for purposes of this petition.

Per the above, the Petitioner has established that the Beneficiary possesses only 38 of the 60 months of qualifying experience required per the labor certification. On appeal, the Petitioner asserts that the Director imposed a novel legal requirement beyond those at 8 C.F.R. § 204.5(g)(1). But the regulation sets out the form of the evidence required, and does not restrict U.S. Citizenship and Immigration Services from analyzing its credibility. As noted by the Director, the instructions to Part K of the labor certification state that all work experience that qualifies a beneficiary for the offered position should be listed. The fact that the Beneficiary did not list his claimed experience with C-L-L-, V-S-P-, or D-R-I- on the labor certification, and thus did not attest, under penalty of perjury, to the truth and correctness of that information when signing the labor certification, lowers the credibility of his claims to that work experience. We have determined, based on the totality of the evidence regarding each employer, that the reduced credibility has been sufficiently overcome by the evidence regarding his employment with C-L-L-, but not with the other claimed employers.

For all of the reasons stated above, we agree with the Director that the Petitioner has not established that the Beneficiary meets the minimum requirements for the offered position. The petition will remain denied.

ORDER: The appeal is dismissed.