U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N- CORP.

DATE: MAR. 28, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM 1-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a manufacturer of industrial equipment, seeks to employ the Beneficiary as a senior applications engineer.[1] 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 possessed the required employment experience for the offered position. On appeal, the Petitioner asserts that the Director erred by not counting the Beneficiary's employment with the Petitioner towards the experience requirement.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor 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). By approving the labor certification, 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 domestic workers similarly employed. Section 212(a)(5)(A)(i)(I)-(II) of the Act.

Second, the employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. For the requested advanced degree professional classification, the Beneficiary must either possess a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate degree (or a

[1] The title of the offered position is described in the record as both "senior applications engineer" and "applications engineer, senior."

foreign equivalent degree) followed by at least five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2).

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.

II. ANALYSIS

A. The Beneficiary's Qualifying Employment Experience

The Beneficiary has the required education for the position offered. The issue on appeal is whether the Beneficiary possessed the required employment experience for the position offered.

The Petitioner must establish that the Beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date.[2] In this case, the priority date is October 19, 2015, the date that the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

The requirements of the offered position are listed on the labor certification application. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS "must examine the certified job offer exactly as it is completed by the prospective employer" even if that leads to a determination that the Beneficiary does not meet the requirements of the offered position. *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the requirements stated on the labor certification must involve "reading and applying the plain language" of the labor certification, even if the employer may have intended different requirements than those stated on the form. *Id.* at 834.

In addition, the Beneficiary's prior employment with the Petitioner cannot be used to satisfy the employment experience requirements of the offered position unless: the position performed by the Beneficiary is not substantially comparable to the offered position; or the employer establishes that it is no longer feasible to train a worker to qualify for the position. *See* 20 C.F.R. § 656.17(h). A "substantially comparable" position means a position requiring performance of the same job duties more than 50% of the time. *Id.*

Here, the labor certification states that the offered position has the following minimum requirements:

H.4 Education: Master's degree in electrical engineering.
H.5 Training: None required.
H.6 Experience in the job offered: 12 months required.
H.7 Alternate field of study: None accepted.

[2] *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

H.8 Alternate combination of education and experience: None accepted.
H.9 Foreign educational equivalent: Accepted.
H.10 Experience in an alternate occupation: None accepted.
H.14 Specific skills or other requirements: "1 or more years of experience with x ray inspection capital equipment. Minimal travel to customer sites."

The Beneficiary has a master's degree in the required field of study, which he completed in December 2008.

Regarding the Beneficiary's work experience, part J.21 of the labor certification states that the Beneficiary "did not gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested."

Part K of the labor certification details the Beneficiary's work experience. It states that Beneficiary has worked for the Petitioner as a senior applications engineer since January 2011. Prior to that, the labor certification states that the Beneficiary worked as a part-time graduate research assistant (20 hours per week) for the [redacted] from September 2009 until December 2010; and as a part-time graduate assistant (20 hours per week) with [redacted] from September 2007 until August 2008.[3] No other experience is listed.

Counsel's cover letter for the petition states that the Beneficiary will be employed by "[redacted] a wholly-owned subsidiary of [the Petitioner], located in [redacted] California." The cover letter also states that the offered position of senior applications engineer "has substantially the same duties as [the Beneficiary] presently holds under approved H-1B (specialty occupation) classification as Applications Engineer."

The letter in support of the petition, signed by the Petitioner's vice president of human resources, states that the Beneficiary is employed as an applications engineer for [redacted] a wholly-owned subsidiary of the Petitioner. The letter in support also states that the Beneficiary's current H-1B position "has substantially the same duties" as the offered senior applications engineer position.

The petition also includes a copy of the Beneficiary's resume, which states that he was employed by [redacted] as an applications engineer from January 2011 until the present.

[3] The letter in support of the petition states that the Beneficiary was employed as a graduate research assistant with [redacted] in [redacted] California from September 2009 until December 2010. This contradicts the labor certification, which states that he was working in [redacted] New York for the [redacted] during this time. The letter in support of the petition also states that the Beneficiary's employment as a graduate assistant at [redacted] ended in October 2008, while the labor certification states that it ended in August 2008, and the employment letter signed by [redacted] states that it ended in July 2008. The Petitioner must resolve these inconsistencies 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).

During the adjudication of the petition, the Director issued a request for evidence (RFE). The RFE noted that the Petitioner claimed at part J.21 of the labor certification that the Beneficiary did not gain any qualifying experience with the Petitioner in a substantially comparable position to the offered job opportunity. Since the Beneficiary's two part-time graduate assistant positions were the only claimed qualifying employment that was not with the Petitioner, the Director instructed the Petitioner to submit additional evidence that the Beneficiary's employment in those two part-time positions satisfied the required 12 months of experience in the job offered under part H.6 of the labor certification.

The RFE response states that the Beneficiary's employment in the two part-time positions did not satisfy the required 12 months of experience in the job offered, but it did satisfy the requirement for experience with X-ray equipment set forth in part H.14 of the labor certification. Instead, the RFE response claims that the Beneficiary gained the required experience while employed as an applications engineer with [redacted] (a subsidiary of the Petitioner) from October 2010 through July 2014. Specifically, the RFE response contains a letter from the Petitioner's director of applications that lists the duties of the applications engineer position and the senior applications engineer position with [redacted] The letter states that the Beneficiary's employment as an applications engineer with [redacted] was "substantially different" from his current employment with [redacted] in the offered position of senior applications engineer because he does not perform the same job duties more than 50% of the time.

The Director denied the petition, pointing out that the Petitioner had contradicted itself by now claiming that the senior applications engineer position was not substantially comparable to the applications engineer position; and concluding that the submitted evidence did not establish that the two positions were not substantially comparable.

On appeal, the Petitioner claims that the Director incorrectly concluded that the Beneficiary's experience as an applications engineer is substantially similar to the offered position of senior applications engineer, and resubmits the employment letter from the director of applications.

We agree with the Director's decision. Part H.6 of the labor certification states that the senior applications engineer position requires 12 months of experience in the job offered. Part J.21 states that the Beneficiary did not gain any qualifying experience with the employer in a substantially comparable position. The petition states multiple times that the Beneficiary's employment as an applications engineer is substantially comparable to the senior applications engineer position. When the Director issued an RFE regarding the Beneficiary's lack of qualifying employment, the Petitioner contradicted its prior statement that the Beneficiary's experience as an applications engineer is substantially comparable. The Petitioner now claims that the positions are not substantially comparable. The Petitioner does not explain why it previously stated multiple times that the positions were substantially comparable.

In addition, the employment letter from the Petitioner's director of applications does not provide a breakdown of how much time the Beneficiary spends on each duty. Without this information, we do

not have enough information to conclude that the Beneficiary would spend more than 50% of his time on different duties. For example, if the two positions only had one duty in common out of nine duties, but the employee performed that same duty 80% of the time, the positions would be substantially comparable.

Further, even if we did conclude that the applications engineer position is not substantially comparable to the senior applications engineer position, we would not be able to find that the Beneficiary met the requirements of the labor certification. The Petitioner cannot claim that the applications engineer position is not substantially comparable to the offered senior applications engineer position and simultaneously claim that his experience as an applications engineer counts as experience in the offered position of senior applications engineer to satisfy the requirements of part H.6 of the labor certification. The labor certification does not allow for experience in any alternate position in H.10. Therefore, if the experience was not substantially similar, it would not qualify under the terms of the labor certification.

There are also several unresolved inconsistencies in the record pertaining to the Beneficiary's employment experience. Part K of the labor certification states that the Beneficiary had only been employed as a senior applications engineer with the Petitioner, while the other descriptions of the Beneficiary's employment state that he was employed as an applications engineer with Also, the employment letter from the director of applications states that the Beneficiary started working as an applications engineer from October 2010 through July 2014, and then was a senior applications engineer, while other evidence in the record states that he began his employment in January 2011 and does not mention him being promoted to senior applications engineer.

Therefore, we conclude that, on appeal, the Petitioner did not establish that the Beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date.

B. The Petitioner is Not the U.S. Employer

Beyond the decision of the Director, we note that the petition states that the Beneficiary has been employed by a California corporation named and that the offered position is also with The petition describes as a wholly-owned subsidiary of the Petitioner, and this description is confirmed by the Petitioner's 2015 annual report in the record of proceedings. is therefore a separate corporate entity from the Petitioner with a separate Federal Employer Identification Number. This means that the Petitioner does not appear to be the proper entity to file the labor certification and the immigrant visa petition on behalf of the Beneficiary. *See* 20 C.F.R. § 656.17(h)(5)(i). Instead, based on the Petitioner's representations about the Beneficiary's current and proposed employment, would appear to be the correct petitioning entity. Therefore, since there does not appear to be an offer of employment with the Petitioner, without resolution of this issue, it would appear this petition might also be denied for that reason.

III. CONCLUSION

The appeal must be dismissed because the Petitioner did not establish that the Beneficiary satisfied the minimum requirements of the offered position, as those requirements were stated on the labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of N- Corp.*, ID# 313303 (AAO Mar. 28, 2017)