U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-, LLC

DATE: MAR. 30, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an information technology consulting business, seeks to employ the Beneficiary as a senior systems 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 Texas Service Center denied the petition. The Director determined that the underlying labor certification did not support the visa classification reflected on the visa petition and that U.S. Citizenship and Immigration Services (USCIS) could not downgrade that classification in response to the Petitioner's request. He further concluded that the record did not establish that the Beneficiary had the qualifying experience required by the labor certification. The Director also found that inconsistencies in the qualifying experience claimed by the Beneficiary supported a finding of fraud and/or willful misrepresentation under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), and, on this basis, he invalidated the labor certification.

The matter is now before us on appeal. The Petitioner asserts that USCIS does have the authority to downgrade the requested visa classification in this matter. It also maintains that the record demonstrates that the Beneficiary has the experience necessary to qualify for the offered position and that the Director erred in finding the inconsistencies in the Beneficiary's employment history to merit a finding of fraud or willful misrepresentation under section 212(a)(6)(C)(i) of the Act.

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

I. LAW

Employment-based immigration is generally 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). Next, USCIS must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must 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.

As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by DOL, accompanies the petition. 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. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certifies that the employment of 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)(II) of the Act.

In visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified in the underlying labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(l), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The priority date of a petition is the date that DOL accepts the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

II. ANALYSIS

On appeal, the Petitioner asserts that the Director erred in concluding that USCIS was precluded from downgrading the classification requested on the visa petition. It also contends that it has established the Beneficiary's qualifications for the offered position but that USCIS is requiring it to establish eligibility for approval "beyond any reasonable doubt," rather than under the preponderance of evidence standard normally used in immigration proceedings. The Petitioner further maintains that the Director's section 212(a)(6)(C)(i) finding does not meet legal and factual requirements, and should be withdrawn.

Based on a review of the record, we find the Director to have erred in concluding that the labor certification in this matter does not support the requested visa classification of advanced degree professional and will withdraw his finding in this regard. We will also withdraw the Director's section 212(a)(6)(C)(i) finding against the Petitioner and Beneficiary, and reinstate the labor certification. Nonetheless, as will be discussed below, the petition may not be approved because the Petitioner has not demonstrated that the Beneficiary is qualified for the offered position; nor has the Petitioner established the existence of a *bona fide* job.

A. Labor Certification Requirements

The Petitioner in this matter is requesting classification of the Beneficiary as an advanced degree professional under section 203(b)(2) of the Act. The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." 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.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." Section 101(a)(32) of the Act lists the following occupations as professions: "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

In the present case, the job offer portion of the labor certification, Part H., states the following requirements for the position:

H.4.	Education: Master's.
H.4-B.	Major field of study: Computer science.
H.5.	Training: None required.
H.6.	Experience in the job offered: Required.
H.6-A.	No. of months of experience: 24.
H.7.	Alternate field of study: Accepted.
H.7-A.	Alternate field of study: Engineering or other IT fields.
H.8.	Alternate combination of education and experience: Accepted.
H.8-A.	Alternate level of education: Bachelor's.
H.8-C.	No. of years of experience: 5.
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in an alternate occupation: Accepted.
H.10-A.	No. of months experience in alternate occupation: 24.
H.10-B.	Job title of alternate occupation: Systems Admin or any suitable combo of ed., training or work exp.
H.14.	Specific skills or other requirements: Minimum Requirements: - Master's Degree in Computer Science, Engineering, or IT related fields (equivalent foreign degree accepted) + 2 yrs. of progressively

> responsible IT exp. using any of the following IMB Systems: TSM,TIM, TAM, or AIX.
> - Alternatively, will also accept Bachelor['s] Degree in Computer Science, Engineering, or IT related fields (3-yr. foreign equiv. degree accepted) + 5 yrs. Progressively responsible IT exp. using any of the following IMB Systems: TSM, TIM, TAM, or AIX.
> - Will also accept any suitable combination of education, training, or work exp.
> - Will accept education evaluation prepared by qualified evaluation service.
> - Must be proficient in UNIX, Windows, and any of the following IBM Systems: IBM Systems: TSM, TIM, TAM, or AIX.
> - Strongly preferred but not required: C, C++, & JAVA.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *Madany v. Smith*, 696 F.2d at 1012-13. We must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984).

Our reading of the labor certification in the present case finds the primary requirements of the offered position to be a master's degree in computer science, engineering, or an information technology field, followed by 2 years of experience in the offered position of senior systems analyst or as a systems administrator. Alternately, the labor certification reflects that the requirements of the offered position may be satisfied by a bachelor's degree or a 3-year foreign equivalent degree in one of the same fields of study, followed by 5 years of experience in the offered position or as a systems administrator. Qualifying experience must include the use of TSM, TIM, TAM, or AIX.

The Director found the Petitioner's acceptance of a 3-year foreign equivalent degree in Part H.14. of the labor certification to indicate that the offered position does not, at a minimum, require a bachelor's degree, basing his conclusion on the reasoning in *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977). However, a reading of the plain language of the Petitioner's alternate educational requirements finds the Director's reliance on *Matter of Shah* to be misplaced.

In *Matter of Shah*, the Board of Immigration Appeals considered the equivalency of a 3-year Indian university degree to a 4-year U.S. baccalaureate. Here, however, the educational alternative stated by the Petitioner in Part H.14. of the labor certification is not a 3-year foreign degree but a 3-year foreign *equivalent* degree. Although 3-year foreign degrees are generally not equivalent to U.S. baccalaureates, we note that such degrees do exist, e.g., certain 3-year baccalaureate degrees awarded in the United Kingdom. Therefore, we view the 3-year foreign equivalent degree stated in

Part H.14. of the labor certification to be the foreign equivalent degree identified in the regulation at 8 C.F.R. § 204.5(k)(2), which when followed by 5 years of progressive experience, is considered the equivalent of a master's degree. Accordingly, the labor certification does support the requested classification of advanced degree professional and we will withdraw the Director's finding to the contrary.[1]

B. Beneficiary's Qualifying Employment

A petitioner must establish a beneficiary's possession of all the education, training, or experience stated on an accompanying labor certification by a petition's priority date. 8 C.F.R. § 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. at 159; *Matter of Katigbak*, 14 I&N Dec. at 49. As noted above, the job offered requires master's degree and 2 years of experience or a bachelor's degree and 5 years of post-baccalaureate experience. Here, the record establishes that the Beneficiary holds a 4-year 1997 bachelor's degree in engineering from India that is equivalent to a U.S bachelor's degree. In attempt to satisfy the requirement of 5 years of post-degree experience, the Beneficiary stated on the labor certification that he had approximately 7 years of experience as an security manager with and approximately 2.5 years of experience as a systems analyst with

The Director issued a notice of intent to dismiss (NOID) advising the Petitioner that inconsistencies in the record relating to the Beneficiary's employment experience suggested that it had misrepresented the Beneficiary's prior job experience. The Director ultimately found that the Petitioner's response did not resolve the numerous inconsistencies in the record regarding the Beneficiary's claimed employment experience and determined that the record did not establish that the Beneficiary had the 5 years of full-time experience required by the labor certification. Moreover, the Director determined that the multiple inconsistencies in the employment that the Beneficiary claimed with when considered in the aggregate, established that the Petitioner and Beneficiary had misrepresented the Beneficiary's job experience to DOL and USCIS. Finding the misrepresentation to be both willful and material, the Director, pursuant to section 212(a)(6)(C)(i) of the Act, invalidated the labor certification under the regulation at 20 C.F.R. § 656.30(d).

In a NOID we sent during the pendency of the appeal, we informed the Petitioner that we too found the record to contain numerous discrepancies with regard to the employment experience claimed by the Beneficiary. Specifically, we notified the Petitioner that the descriptions of the positions held and job duties performed by the Beneficiary with and were reported

[1] The Petitioner requested changing classification from 1.d., "[a] member of the professions holding an advanced degree or an alien of exceptional ability" to 1.e., "[a] professional."[1] It asserted that the downgrading in classification would allow the Beneficiary to benefit from the visa petition and was permitted by USCIS' Standard Operating Procedures for I-140 Petitions. Having withdrawn the Director's finding that the labor certification does not support the requested classification, it does not appear necessary to consider the Petitioner's request for reclassification of the visa petition.

inconsistently on the labor certification filed in this case and on labor certifications filed in support of previously filed Form I-140 petitions.[2] Our NOID also indicated that the employment letters and statements relating to the Beneficiary's experience with these employers did not satisfy the regulation at 8 C.F.R. § 204.5(g)(1), as they provided insufficient or unreliable information on the Beneficiary's duties and dates of employment. Accordingly, to establish the Beneficiary's qualifying employment, we asked the Petitioner to submit copies of the Beneficiary's actual employment contracts with [redacted] and [redacted] signed and dated by the Beneficiary and a company representative, and identifying his period(s) of employment, position(s) held, and duties performed.

In response, the Petitioner has supplemented the appeal with a second copy of the Letter of Employment issued to the Beneficiary by [redacted] prior to his employment there.[3] The letter reflects that the Beneficiary was to be prospectively employed as a software engineer, with a salary of $65,000 per year, and lists his employment benefits. The Petitioner has also provided a copy of a second letter that offers the Beneficiary prospective employment as a software engineer at [redacted] stating his salary and the terms of his employment. Neither letter lists the duties to be performed by the Beneficiary, nor indicates the dates of his employment.

To resolve the Beneficiary's differing descriptions of his employment with [redacted] and [redacted] in the labor certifications, the Petitioner has submitted an expert opinion from [redacted] Ph.D., Professor Emeritus, [redacted] In his opinion, dated December 6, 2016, [redacted] concludes that the Beneficiary's descriptions of the duties he performed for [redacted] are consistent, and finds them to indicate that the Beneficiary was responsible for "performing software administrative duties, as well as writing test cases and working on various operating systems." Although [redacted] notes that the wording of the duties described by the Beneficiary differs from one labor certification to another, he also states that "an employee working as a security administrator, senior systems analyst, or software engineer for an IT consulting and implementation services provider might be responsible for any number of the duties listed by the Beneficiary. He further states that he finds it entirely plausible that the Beneficiary would have taken on different roles, "depending on the current project and end client requirements," during his time with [redacted] also finds the Beneficiary's descriptions of his duties in the labor certification and that filed by an earlier petitioner to reflect his involvement with the design of system architecture, and that the duties he listed in a third labor certification do not exclude such involvement.

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[2] The record reflects that the Beneficiary has had four Forms I-140 filed on his behalf. The Petitioner filed two of these petitions, the one now before us and another filed on March 31, 2011. The other petitions were filed by [redacted] on October 12, 2006, and a software consulting business, [redacted] on October 13, 2011.

[3] The Petitioner also provided a copy of this letter in its response to the Director's October 22, 2014, notice of intent to deny.

review of the duties the Beneficiary listed on the labor certifications to describe his employment with also finds them to be consistent and that "[w]hile the exact wording used to describe the duties does differ, it is clear that these descriptions are not contradictory and could certainly describe the same position."

While we note analysis of the Beneficiary's varying descriptions of his job duties with and we do not find it to establish that he has the qualifying employment experience required by the labor certification. The fact that the various duties listed by the Beneficiary in describing his employment with may all be performed by a security administrator, senior systems analyst or software engineer in an IT business and that the Beneficiary could have taken on different roles depending on the project and client requirements, does not overcome the fact that the labor certifications in the record reflect differing descriptions of the duties that the Beneficiary performed while employed by Similarly, the labor certifications' inconsistent descriptions of the Beneficiary's duties for are not resolved by findings that the duties described are not contradictory and "could certainly describe the same position."

In employment-based immigration proceedings, a determination as to whether a beneficiary has the employment experience required by the labor certification is based on the specific duties of that employment. In the present case, the record does not reliably establish the duties performed by the Beneficiary for and Moreover, as was detailed in our NOID, the dates of employment claimed by the Beneficiary have been reported inconsistently. In response, the Petitioner asserts nothing more than that mistakes may have been made in reporting the Beneficiary's dates of employment. Accordingly, we will accept neither job as qualifying employment in this proceeding. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We also note that the Petitioner, in response to the Director's NOID, has asserted that its employment of the Beneficiary as a systems administrator from April 17, 2007, to May 7, 2009, should be viewed as qualifying employment. However, although we do not agree with the Director's finding that the position was "substantially comparable"[4] to the offered position and could not be used to qualify the Beneficiary for the job opportunity, we also do not find the record to establish that the Beneficiary performed the duties of a systems administrator throughout the period claimed on the labor certification. The Director's reference in his decision to USCIS' February 24, 2009, site visit to the Petitioner's office, which found the Beneficiary to be employed as its general manager, casts significant doubt on the Petitioner's claim that it was employing the Beneficiary as a systems administrator during this time. We will not, however, consider this issue further as the Beneficiary's employment with Petitioner as a systems administrator, even if established as

[4] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17 and states that a substantially comparable job or position means a job or position requiring the performance of the same job duties more than 50 percent of the time.

qualifying employment, lasted only 2 years; too brief a period to qualify the Beneficiary for the offered position.

Therefore, based on the evidence before us, we do not find the record to establish that the Beneficiary has the 5 years of qualifying experience required by the labor certification and we will dismiss the appeal on this basis.

Nevertheless, we do not find the record to contain sufficient evidence to establish that the inconsistencies in the record's reporting of the Beneficiary's qualifying employment represent the willful misrepresentation of a material fact under section 212(a)(6)(C)(i) of the Act. Accordingly, we will withdraw the Director's finding in this regard and reinstate the labor certification.

C. *Bona fide* job opportunity

Although not addressed by the Director in his decision, our review of the record has also found reason to question whether the offered position of senior systems analyst was a *bona fide* job opportunity at the time the Petitioner filed the labor certification.

A job opportunity must exist, be clearly open to U.S. workers, and be offered to U.S. workers with wages, terms, and conditions as favorable as those offered to the beneficiary. 20 C.F.R. §§ 656.3; 656.10(c)(8); 656.17(f)(3); *see also Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 405 (Comm'r 1986) (quoting a DOL advisory opinion that "requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not be the functional equivalent of self-employment"). Pursuant to 20 C.F.R. §§ 656.10(c)(8) and 656.3, a petitioner has the burden, when asked, to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *Matter of Amger Corp.*, 87-INA-545 1987 WL 341738, *2 (BALCA 1987) (*en banc*). We may deny a petition that does not comply with DOL regulations. *See., e.g., Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1974) (upholding the denial of a petition where the accompanying labor certification was invalid for the geographic area of intended employment pursuant to 20 C.F.R. § 656.30(c)(2)).

The regulation at 20 C.F.R. § 656.17 states in pertinent part:

> (l) *Alien influence and control over job opportunity.* If the employer is a closely held corporation or partnership in which the alien has an ownership interest . . . the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers . . . .

"Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S.

applicant, the question arises whether the employer has a bona fide job opportunity."[5] *See Matter of Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*).

In our NOID, we informed the Petitioner that a review of online business records maintained by the Illinois Secretary of State reflected that it had registered its business in Illinois on August 1, 2008, as a member-managed partnership, with three partners, one of which was the Beneficiary. Although we noted that the Illinois registration had been revoked as of February 10, 2011, we notified the Petitioner that if the Beneficiary had held such a position at the time that it filed the labor certification in this matter, it raised concerns regarding the extent to which the offered position had been open to all qualified U.S. workers. To clarify the Beneficiary's role in its business, we asked the Petitioner to document the history of its ownership and management, noting that it appeared such changes had occurred as the record contained a copy of the Schedule K-1 from the Petitioner's 2011 Form 1065 identifying partners who had not been reflected in its prior Form 1065 filings.[6] We also indicated that if the information reflected in the Illinois database was the result of error, the Petitioner should submit evidence documenting this fact.

In response, the Petitioner indicates that it has taken steps to reactivate its business registration in Illinois in order to correct its business record there. It submits a December 7, 2016, letter from its human resources manager, who states that she has been informed that the Beneficiary's listing as one of the Petitioner's managing members in its Illinois business registration was a mistake. She further reports that she is coordinating the Petitioner's efforts to get the records corrected. In support of this claim, the Petitioner provides a November 23, 2016, letter to the Illinois Secretary of State, signed by this same human resources manager, which transmits an Application for Reinstatement Following Administrative Dissolution or Revocation, with a fee of $500; several Annual Reports, which are to cover the years 2010 through 2016, along with checks for corresponding dues; a Statement of Change of Registered Agent, with a fee of $25; and an LLC File Detail Report, a List of LLC Members in Illinois records and a Revoked Status for File.

While we acknowledge the Petitioner's submission of the above materials, we do not find them responsive to our request for evidence of the Petitioner's history with respect to its ownership or management, or to demonstrate that the identification of the Beneficiary as a managing partner in Illinois business databases was the result of a mistake, as claimed above. The December 7, 2016, letter does not inform the office of the Illinois Secretary of State that the Petitioner is seeking to correct an

[5] The same standard has been incorporated into the PERM regulations. *See* 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004).

[6] In any future proceedings, the Petitioner will need to address the change in its ownership that appears to have taken place in 2011 and whether it remains the same business entity that filed the labor certification or may be considered its successor-in-interest. *See Modular Container Systems, Inc.*, 1989-INA-228. From 2006 through 2010, the Forms 1065 filed by the Petitioner reflected the same two partners. However, its 2011 Form 1065 identified two new partners and its Forms 1120S for 2012 through 2015, reflect a sole proprietorship. When considering business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require a petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.

error in its business database, only that it wishes to "update" its records with regard to its members, and the Petitioner has submitted no documentary evidence, e.g., copies of the materials it submitted in registering its business in Illinois, to support its claim. Neither does it assert that such evidence does not exist or is otherwise unavailable.

Therefore, in the absence of any probative evidence establishing that the identification of the Beneficiary as one of the Petitioner's managing partners in Illinois databases was the result of an error, we find this information to demonstrate that, at the time the Petitioner filed the labor certification, the Beneficiary was, more likely than not, in a position to control its hiring decisions with regard to the offered position. The fact that the Petitioner's business registration in Illinois was revoked on February 10, 2011, is not evidence that the Beneficiary ceased to be one of the Petitioner's three managing partners at that time. Accordingly, we do not find the Petitioner to have established the offered position as a *bona fide* job opportunity and will dismiss the appeal for this reason as well.

III. CONCLUSION

The Director denied the visa petition based on his finding that the labor certification did not support the classification of the Beneficiary as an advanced degree professional and that inconsistencies in the qualifying experience claimed by the Beneficiary prevented him from establishing the 5 years of qualifying employment experience required by the labor certification. The Director also found these same inconsistencies to demonstrate that the Petitioner and Beneficiary had willfully misrepresented the Beneficiary's job experience to DOL and USCIS. Based on his section 212(a)(6)(C)(i) finding, the Director invalidated the labor certification.

On appeal, we find that the labor certification does support the requested classification of advanced degree professional and withdraw the Director's finding to the contrary. We also withdraw the Director's section 212(a)(6)(C)(i) finding and reinstate the labor certification. However, we agree with the Director that the record does not establish that the Beneficiary has the 5 years of qualifying employment experience required by the labor certification. Additionally, we do not find the Petitioner to have demonstrated that the offered position is a *bona fide* job opportunity.

ORDER: The appeal is dismissed.

FURTHER ORDER: The ETA Form 9089, ETA Case Number [redacted] is reinstated.

Matter of I-, LLC, ID# 89667 (AAO Mar. 30, 2017)