U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-T-, INC.

DATE: MAY. 1, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of software development and consulting services, seeks to employ the Beneficiary as a systems analyst. It requests his classification as a member of the professions holding an advanced degree under the second-preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based "EB-2" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status if he or she has a master's degree, or a bachelor's degree followed by five years of experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the record did not establish, as required for the offered position and the requested classification, the Beneficiary's possession of at least five years of post-baccalaureate experience.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in measuring the Beneficiary's experience from the date of his baccalaureate diploma, rather than from the earlier date on which he was awarded a provisional certificate.

Upon *de novo* review, we will withdraw the Director's decision and remand this matter for further proceedings consistent with this opinion and for the entry of a new decision.

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).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving a labor certification, the DOL certifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position and that a foreign national's permanent employment in the position will not harm the wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. If the DOL approves the labor certification, the employer then must submit an immigrant visa petition

[1] In cases like this one, the filing date of a labor certification is called the "priority date." As of that date, a beneficiary must meet the job requirements of an offered position. Thus, the Beneficiary here must have had the five years' requisite experience by the date of the labor certification's filing.

to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, 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.

For an advanced degree professional position, a labor certification must state that the job requires an advanced degree or its equivalent. *See* 8 C.F.R. § 204.5(k)(4)(i). In pertinent part, Department of Homeland Security regulations define the term "advanced degree" as "any 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." 8 C.F.R. § 204.5(k)(2) (emphasis added). Thus, to qualify as an advanced degree professional, a beneficiary with a U.S. bachelor's degree or its foreign equivalent must also possess five years of post-degree experience. 8 C.F.R. § 204.5(k)(3).

II. ANALYSIS

A. The Beneficiary's Post-Baccalaureate Experience

The record establishes the Beneficiary's possession of a foreign degree equivalent to a U.S. bachelor's degree in an acceptable field of study. The Petitioner also submitted evidence that the Beneficiary has more than five years of progressive experience in the specialty, from December 15, 2008, to January 17, 2014.

The Director, however, found that the Beneficiary's post-baccalaureate experience did not begin until November 27, 2009, when he received his formal baccalaureate diploma. The Director concluded that the Beneficiary's post-degree experience, from November 27, 2009, to January 17, 2014, did not meet the requisite amount of five years.

On appeal, the Petitioner maintains that the Beneficiary's receipt of a provisional certificate on May 18, 2008, marks his attainment of the degree. The Petitioner therefore contends that all of the Beneficiary's experience is post-baccalaureate in nature, satisfying the requirements of the offered position and the requested classification.

The Act and the EB-2 regulations speak in terms of "degrees," not "diplomas." So, we cannot simply limit our analysis to the date on which a school confers a formal diploma. Indeed, the regulations expressly distinguish between degrees and diplomas. For these EB-2 "bachelor plus five" petitions, the "initial evidence" rule requires submission of an "official academic record" showing the beneficiary has a foreign equivalent "degree." 8 C.F.R. § 204.5(k)(3)(i)(B). An "official academic record" is not limited to a formal diploma.[2] In fact, in the very next provision –

[2] *See also* USCIS Adjudicator's Field Manual, Appendix 22-1, Memorandum from Michael D. Cronin, Acting Associate Commissioner, USCIS HQ 70/6.2, *Educational and Experience Requirements for Employment-Based Second Preference*

relating to EB-2 exceptional ability petitions – the initial evidence rule expressly distinguishes between degree and diploma: "[a]n official academic record showing that the alien has a *degree, diploma, certificate, or similar award* from a college, university, ..." 8 C.F.R. § 204.5(k)(3)(ii)(A) (emphasis added).[3]

Accordingly, we must conduct a case-specific analysis to determine whether, at the time an official academic record is issued, the individual has completed all substantive requirements to earn the degree. We must consider the individual nature of each university's or college's requirements for each program of study and each student's completion of those requirements. A petitioner will bear the burden to establish that a beneficiary's official academic record shows both the completion of all degree requirements and the issuing school's approval of the degree.[4]

Here, the issuance of the Beneficiary's provisional certificate on May 18, 2008, demonstrates his completion of all substantive baccalaureate degree requirements and his university's approval of the degree. The certificate states the Beneficiary's passage of the degree examination and his satisfaction of "all the requirements for the award of the degree." A copy of a May 16, 2008, consolidated marks memorandum also indicates the Beneficiary's passage of the baccalaureate exam and his completion of four years of coursework.

The Petitioner also submitted information from the Electronic Database for Global Education (EDGE), an online resource that federal courts have found provides reliable, peer-reviewed information about foreign educational equivalencies.[5] EDGE states that an Indian provisional degree certificate:

> [I]s evidence of completion of all requirements for the degree in question, the name of the degree and the date upon which it was approved by the responsible university governing body, and is comparable to an official US academic transcript with a degree statement certifying completion of all requirements for the degree, the name of

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(EB-2) Immigrants (March 20, 2000), https://uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26573/0-0-0-31107.html (last visited Apr. 19, 2017), ("Whether the alien beneficiary possesses the advanced degree should be demonstrated by evidence *in the form of a transcript from the institution* that granted the advanced degree. An adjudicator must similarly consider the *baccalaureate transcript*....") (emphasis added).

[3] While this provision helps clarify that the terms degree and diploma are not equivalent, we note generally that, in contrast to the advanced degree category, the EB-2 exceptional ability category is not grounded entirely in an academic award and thus its initial evidence rule is more expansive than that of the advanced degree category.

[4] Along with any other proffered evidence, Petitioners must also submit a copy of a beneficiary's statement of marks or transcript to demonstrate years of study, and coursework completed, along with a copy of the provisional certificate. *See* 8 C.F.R § 204.5(k)(3) (requiring the submission of an official academic record as evidence of a beneficiary's possession of an advanced degree or equivalent of an advanced degree).

[5] EDGE was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), "a nonprofit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in over 40 countries." AACRAO, at http://www4.aacrao.org/centennial/about.htm (last visited Apr. 19, 2017); *see also, e.g., Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (describing EDGE as "a respected source of information").

> the degree and the date upon which it was approved by the academic senate at universities in the United States.[6]

EDGE also notes that some Indian students forgo receipt of their formal diplomas, relying instead on their provisional degree certificates as evidence of their degrees. *Id.*

Here, the Petitioner has submitted official academic records demonstrating the Beneficiary's completion of all substantive degree requirements and his university's approval of the baccalaureate rank as of May 18, 2008. Thus, contrary to the Director's finding, the record establishes the Beneficiary's possession of a foreign equivalent of a U.S. bachelor's degree as of May 18, 2008. Accordingly, we find that the Beneficiary has the five years of post-baccalaureate experience required by the labor certification and for the requested classification. We will withdraw the Director's decision.

B. The Petitioner's Ability to Pay the Proffered Wage

Although the Beneficiary has the qualifications for the offered position and the requested classification, the petition is not approvable. The record does not establish the Petitioner's ability to pay the proffered wage. 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 of pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage each year, we consider whether it generated annual amounts of net income and net current assets sufficient to pay the difference between the annual proffered wage and any actual wages paid. If net income and net currents are insufficient, we may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[7]

In this case, the labor certification states the proffered wage of the offered position of systems analyst as $76,887 per year. The petition's priority date is March 5, 2015.

The Petitioner submitted a copy of its federal income tax returns for 2014. But the record lacks regulatory required evidence of its ability to pay in 2015, the year of the petition's priority date, or

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[6] *See India: Provisional Degree Certificate*, AACRAO, http://edge.aacrao.org/country/credential/ provisional-degree-certificate (last visited Apr. 7, 2017).

[7] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

thereafter. Contrary to 8 C.F.R. § 204.5(g)(2), the record therefore does not establish the Petitioner's ability to pay the proffered wage from the priority date onward.

Also, USCIS records indicate the Petitioner's filings of multiple immigrant visa petitions. The records indicate the Petitioner's filings of at least eight petitions for other beneficiaries that remained pending after this petition's priority date.[8]

As previously indicated, the Petitioner must demonstrate its ability to pay the proffered wage of this petition from its priority date onward. *See* 8 C.F.R. § 204.5(g)(2). The Petitioner therefore must demonstrate its ability to pay the combined proffered wages of this petition and those that were approved (but whose beneficiaries had not obtained permanent residence) or remained pending after this petition's priority date. Otherwise, if each petition's proffered wage did not exceed the Petitioner's annual amounts of wages, net income, or net current assets, the Petitioner could unrealistically demonstrate its ability to pay an unlimited number of beneficiaries. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977) (holding that the ability-to-pay requirement establishes a job offer as "realistic").

Thus, the Petitioner must demonstrate its ability to pay the combined proffered wages from this petition's priority date of March 5, 2015, until the beneficiaries of its other pending petitions obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the approval date, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple, pending petitions).

The record does not indicate the proffered wages of the Petitioner's other pending petitions, or whether it paid wages to their beneficiaries. The record also does not indicate whether the beneficiaries obtained lawful permanent residence, or whether their petitions were denied, withdrawn, or revoked. Without this information, USCIS cannot determine the Petitioner's ability to pay the proffered wage.

Because the Director did not address the Petitioner's ability to pay the proffered wage, we will remand this matter for further consideration. On remand, the Director should notify the Petitioner of additional evidence required to establish its ability to pay and afford it a reasonable opportunity to respond.

C. The *Bona Fides* of the Job Opportunity

The record also does not establish the *bona fides* of the job opportunity. USCIS may deny a petition accompanied by a labor certification that violates DOL regulations. *See Matter of Sunoco Energy*

[8] USCIS records identify the eight other pending petitions by the following receipt numbers: [redacted] and [redacted]

Dev. Co., 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where the labor certification was invalid for the geographical area of intended employment).

DOL regulations require a labor certification employer to attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). "This provision infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, *X (BALCA 1991) (*en banc*) (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

To determine the *bona fides* of a job opportunity, we must weigh various factors. We must consider whether a beneficiary: 1) is in a position to control or influence hiring decisions regarding the offered position; 2) has a relationship to a petitioner's director, officer, or employee; 3) incorporated or founded a petitioner; 4) has an ownership interest in it; 5) participates in its management; 6) sits on its board of directors; 7) is one of a small number of employees; 8) meets specialized or unusual qualifications for the offered position; or 8) has personal attributes that, in their absence, would likely cause the petitioner to cease operations. *Matter of Modular Container*, at *8. We must also consider a petitioner's compliance with DOL regulations and whether it recruited for the offered position in good faith. *Id.*

In this case, USCIS and online state records suggest the Beneficiary's familial and business relationships with an employee and principals of the Petitioner. USCIS records indicate the Petitioner's employment of the Beneficiary's spouse in nonimmigrant work visa status from 2014 to 2017.[9] The records also indicate that, earlier this year, a company headquartered in the same building as the Petitioner filed a nonimmigrant work visa petition for the Beneficiary's spouse.[10] California records identify the neighbor company's chief executive officer (CEO), secretary, and director as the spouse of the Petitioner's "director" who signed this petition and the labor certification for the Beneficiary.[11] The records also identify the officer of the neighbor company as the Petitioner's CEO, secretary, and director in 2016. *Id.* Additional filings with USCIS also identify the Petitioner's director as a director of the neighbor company.

Thus, as of the labor certification's filing on March 5, 2015, the record indicates the Petitioner's employment of the Beneficiary's spouse. The record also suggests business relationships among the Beneficiary and the Petitioner's director and his spouse, who appear to be principals of both the Petitioner and the neighbor company that now employs the Beneficiary's spouse. These relationships cast doubts on the availability of the offered position to U.S. workers and the Petitioner's compliance with DOL regulations. If the Petitioner willfully misrepresented the *bona*

[9] *See*

[10] *See*

[11] *See* Cal. Sec'y of State, "Business Search," at https://businesssearch.sos.ca.gov (last visited Apr. 7, 2017).

fides of the job opportunity on the labor certification, USCIS may also invalidate the labor certification. *See* 20 C.F.R. § 656.30(d).

On remand, the Director should ask the Petitioner to submit evidence of the *bona fides* of the job opportunity. Under 20 C.F.R. § 656.17(l), requested evidence should include copies of: 1) the Petitioner's articles of incorporation; 2) a list of its officers and shareholders, their titles and positions in the business, and descriptions of their relationships to each other and the Beneficiary; 3) the total amount invested in the Petitioner and the amounts invested by each officer, incorporator, and the Beneficiary; 4) the name of the company official primarily responsible for interviewing and hiring applicants; and 5) the names of company officials with control or influence over hiring decisions involving the offered position.

To consider whether the Petitioner recruited for the offered position in good faith, the Director should also ask the company to submit copies of its labor certification documentation, including: 1) its posted notice of filing; 2) its prevailing wage determination; 3) its job order placed with a state workforce agency; 4) its newspaper and Internet advertisements of the offered position; 5) its recruitment report; 6) resumes or applications received from U.S. workers; and 7) any correspondence with DOL during the labor certification process.

III. CONCLUSION

The record establishes the Beneficiary's possession of the education and experience required by the terms of the labor certification and for classification as an advanced degree professional. However, the record does not establish the Petitioner's ability to pay the proffered wage or the *bona fides* of the job opportunity.

ORDER: The decision of the Director 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 E-T-, Inc.*, ID# 135113 (AAO May. 1, 2017)