U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-, INC.

DATE: MAY 1, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a software provider to the commercial rental industry, seeks to employ the Beneficiary as a computer programmer. It requests her classification under the third-preference, immigrant category as a professional. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a bachelor's degree.

After the Director of the Texas Service Center denied the petition, we dismissed the Petitioner's appeal and denied its following motions to reopen and reconsider. *See Matter of S-, Inc.*, ID# 1369539 (AAO July 31, 2018). We affirmed the Director's conclusion that the Petitioner did not demonstrate its required ability to pay the position's proffered wage. We also found that the record did not establish the Beneficiary's qualifying experience for the offered position.

The matter is before us again on the Petitioner's motions to reopen and reconsider. It submits additional evidence and argues that we erred by declining to prorate the position's proffered wage for the year of the petition's priority date. It also asserts that it may rely on experience the Beneficiary gained while working as a contractor at its site because the job duties of the offered position substantially differ from her prior, contracted duties.

Upon review, we will deny the motions.

I. MOTION CRITERIA

A motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). In contrast, a motion to reconsider must establish that a decision misapplied law or policy based on the record at that time. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must also cite a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. *Id.* We may grant motions that meet these requirements and establish a petition's approvability.

II. ABILITY TO PAY THE PROFFERED WAGE

In our most recent decision, we found that the Petitioner did not demonstrate its ability to pay the position's annual proffered wage of $66,500 in 2015 or 2016. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence). Because of unexplained discrepancies between payroll records and IRS Forms W-2, Wage and Tax Statements, the record did not establish that the Petitioner's payments to the Beneficiary in those years equaled or exceeded the proffered wage. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). Also, the Petitioner did not demonstrate its ability to pay the combined proffered wages of this and other petitions that were pending or approved as of this petition's priority date of October 15, 2015, or filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014 (affirming a petition's revocation where, as of the grant, a petitioner did not demonstrate its ability to pay combined proffered wages of multiple petitions). Contrary to the request in our notice of intent to dismiss, the Petitioner did not provide the proffered wages or priority dates of its other petitions. *See* 8 C.F.R. § 103.2(b)(14) (requiring a petition's denial if a petitioner does not submit requested evidence that "precludes a material line of inquiry").

On motion, the Petitioner does not address the denial grounds of our most recent decision. Rather, it contests our denial of its request to prorate the proffered wage.[1] Because the Petitioner's motions do not address the denial grounds, its filings do not demonstrate its ability to pay the proffered wage in 2015 or 2016. Even if we prorated the proffered wage in 2015 as the Petitioner urges, the record would not establish its ability to pay that year. The Petitioner has not established the accuracy of the Beneficiary's payroll records by resolving their discrepancies with her Form W-2, nor has the Petitioner submitted the information required to evaluate its wage burden to its multiple sponsored beneficiaries.

For the foregoing reasons, the Petitioner has not demonstrated its continuing ability to pay the position's proffered wage from the petition's priority date onward. We will therefore affirm our prior decision on this ground.

III. REQUIRED EXPERIENCE FOR THE OFFERED POSITION

If a labor certification employer already employs a foreign national, it generally cannot rely on experience that he or she gained with it. 20 C.F.R. § 656.17(3). An employer may use such experience only if the foreign national gained it in a position substantially different than the offered

[1] In our most recent decision, although we did not prorate the proffered wage, we did considered the effect of the period between the petition's priority date and the end of 2015 in our totality of the circumstances analysis of the Petitioner's ability to pay,.

one, or the employer can demonstrate the impracticality of training a worker for the job. *Id.* Prohibited experience includes experience gained with the employer "as a contract employee." *Id.*

Here, the Petitioner concedes that it employs the Beneficiary and that she gained experience for the offered position as a contractor at the Petitioner's site. It argues, however, that her contracted position substantially differed from the offered position. For these purposes, a substantially different position means a job that required performance of the same duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

The Petitioner submitted evidence that, when the Beneficiary served as a contractor at its site, another company employed her and her work product constituted "the sole property" of that employer. The Petitioner therefore contends that, "under basic and traditional principles of employment law," the Beneficiary's job with her prior employer "fundamentally" differed from the offered position with the Petitioner.

As previously indicated, however, the regulation at 20 C.F.R. § 656.17(i)(3) specifies its application to experience gained "as a contract employee." The U.S. Department of Labor (DOL) intended the term "contract employee" to "include all persons contracted to work for the employer." DOL, "OFLC [Office of Foreign Labor Certification] Frequently Asked Questions and Answers," "Prevailing Wage #10," https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!76 (last visited Apr. 22, 2019). DOL states that it defined the term broadly "to ensure the provision applies to experience gained working for the employer by the foreign worker, *whatever the foreign worker's employment status*." *Id.* (emphasis added). Thus, even though the Beneficiary had a different employer as a contractor, DOL guidance indicates that 20 C.F.R. § 656.17(i)(3) bars the Petitioner's reliance on her prior experience at its site.

The Petitioner also asserts that, while its staff size remained the same, its number of customers more than quintupled from 2010, when the Beneficiary previously worked at its site, until 2015, the year of the petition's priority date. The Petitioner argues that "such an extraordinary increase in the work without a corresponding increase in the workforce by definition reflects a substantial, even fundamental, change in the Beneficiary's job duties."

The record, however, does not support the Petitioner's argument. On motion, it submits charts indicating its customer growth from 2009 to 2015. But the record lacks independent, objective evidence of the growth, such as copies of contracts or invoices. The Petitioner also has not explained how the job duties of the Beneficiary changed. As detailed in our prior decision, the accompanying labor certification states that her current and former positions share many of the same job duties. The record does not sufficiently explain how the positions differ or what percentages of time the Beneficiary spent or spends on their job duties. A petitioner bears the burden of demonstrating eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. For the foregoing reasons, the Petitioner has not established the Beneficiary's qualifying experience for the offered position.

IV. CONCLUSION

The Petitioner's evidence and arguments on motion do not establish the petition's approvability or our misapplication of law or policy. We will therefore deny the motions for the reasons stated above, with each considered an independent and alternative basis for denial. Contrary to section 291 of the Act, the Petitioner has not established eligibility for the benefit sought.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of S-, Inc.*, ID# 2595602 (AAO May 1, 2019)