U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30993115

Date: MAY 10, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a small business financing company, seeks to employ the Beneficiary as an operations research analyst. It requests classification of the Beneficiary as a professional under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b) (3)(A)(ii), 8 U.S.C. § 1153(b) (3)(A)(ii). This immigrant visa category allows a U.S. employer to sponsor a professional with a bachelor's degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that that the Beneficiary possessed the required experience for the offered position. 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 a 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). In this case, the priority date is July 28, 2022.

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.

II. ANALYSIS

The sole ground for the Director's decision to deny the petition was that the Petitioner did not establish that the Beneficiary qualified for the offered position. In Part H of the labor certification, the Petitioner stated the following requirements for the position of operations research analyst:

H.4 Minimum level of education required: Master's
H.4-B Major field of study: Economics, finance, accounting or related field
H.5 Training required: 12 months
H.5-B Field of training: consulting, internal finance, and/or business analyst roles
H.6 Experience in job offer required: 12 months
H.7 Alternate field of study acceptable: No
H.8 Alternate combination of education and experience: No
H.9 Foreign equivalent education acceptable: No
H.10 Alternate occupation acceptable: No

Also, the Petitioner indicated in Part J.21 that the Beneficiary did not gain any of the qualifying experience with the Petitioner in a substantially comparable position.

In response to the Director's request for evidence (RFE), the Petitioner submitted copies of the Beneficiary's diploma and transcripts showing that she earned a Master of Business Administration degree from a U.S. university, establishing that she met the educational requirements for the offered position. As evidence that she had at least 12 months of experience in the offered position, the Petitioner submitted letters from two of the Beneficiary's former employers. The letter from D-M- verified that the Beneficiary had been employed by its subsidiary I-C- as a finance analyst for approximately 8 months 2 weeks, and the letter from H-B-C- verified that she was employed full-time as a senior analyst for approximately 2 months and 1 week. The Petitioner also submitted a letter stating that it had employed the Beneficiary in the offered position for approximately 3 years and 6 months before the priority date. These letters matched the dates, employers and job titles for the previous employment stated by the Beneficiary on the labor certification.

The Director noted in his decision that the evidence did not show that the Beneficiary had gained at least 12 months of experience with an employer other than the Petitioner, and thus did not establish that she was qualified for the position. On appeal, the Petitioner asserts that the Director disregarded evidence of the Beneficiary's work experience, including her resume and the labor certification that she signed.

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 a 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, in addition to the

fact that the letters from I-C- and H-B-C- do not document at least 12 months of training or work experience, they also do not include a specific description of the duties performed (or training received) by the Beneficiary as required. The Petitioner has thus not established that the Beneficiary gained qualifying experience or training with either of these employers.

In addition, 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). In this case, in addition to its response in Part J.21 of the labor certification, the Petitioner stated in its letter that the Beneficiary's duties in the offered position exactly match those she has been performing with it since being hired. Therefore the Beneficiary's experience working for the Petitioner cannot be relied upon to meet the offered position's minimum requirements.

The Petitioner asserts on appeal that the Director did not consider the Beneficiary's resume, as well as her listing of employment experience and duties with her previous employers on the labor certification, when evaluating the evidence of her qualification for the offered position, and did not provide an explanation. However, the regulation at 8 C.F.R. § 204.5(g)(1) states the requirements for evidence of an individual's training and experience, which as explained above the evidence here does not meet. In addition, the Petitioner has not indicated that letters complying with the regulation from other previous employers are unavailable, or submitted any independent evidence documenting that experience. The Beneficiary's own statements regarding her work experience in her resume are insufficient to establish that she gained the minimum qualifying work experience before the priority date.

In support of its assertion that the Director should have considered the Beneficiary's own statements on the labor certification about her previous work experience with employers other than the Petitioner, I-C, and H-B-C-, the Petitioner cites to a district court slip opinion for the proposition that "USCIS relies upon information provided by employer on the labor certification to establish years of experience." However, the court in that decision made no such finding, and the employer did not rely upon the statements in the labor certification as a basis for establishing that that beneficiary met the minimum qualifications for the offered position. Rather, the court focused upon whether on-the-job training can be considered as qualifying work experience based upon previous DOL regulations and labor certification application form. Notably, when describing the labor certification process, it noted that when filing a petition after DOL's approval of the labor certification, an employer "submits documents to show the beneficiary meets all of the job's requirements, which are specified by the employer in the labor certification application."

The Petitioner also cites to a District Court decision and asserts that USCIS should not take a "mechanical" approach to determining whether a beneficiary possess the minimum experience. *Singh v. Attorney Gen.*, 510 F.Supp. 351 (D.D.C. 1980, *aff'd* 672 F.2d 894 (D.C. Cir. 1981). During labor certification proceedings, the DOL may review a beneficiary's qualifications as stated on the labor certification for an offered position. *See, e.g.*, 20 C.F.R. § 656.17(i)(3) (barring a foreign national, as of his or her hiring by a labor certification employer, from having less training or

experience than is required of U.S. applicants). USCIS, however, has the ultimate authority to determine a beneficiary's qualifications for a DOL-certified position and for the requested immigration classification. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b) (authorizing USCIS to approve a petition alter determining that "the facts stated in the petition are true" and that a foreign national qualifies for the requested preference classification). Moreover, "DOL may gauge an alien's skill level in evaluating the effect of the alien's employment on United States workers," but that "does not foreclose [the immigration service] from considering alien qualifications in the preference classification decision." *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983). The Ninth Circuit, citing *K.R.K. Irvine. Inc.*. 699 F.2d at 1006, revisited this issue, stating:

> ***3** [T]he Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine. Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).

USCIS, therefore, may make a de novo determination of whether a beneficiary is in fact qualified to fill the certified job offer, and the Petitioner's assertion that USCIS must accept the Beneficiary's own responses to DOL on the labor certification as dispositive evidence of her qualification is without basis.

For 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 as stated on the labor certification. It has therefore not established eligibility for the requested classification, and the petition will remain denied.

ORDER: The appeal is dismissed.