U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-A-D-S-, INC.

DATE: MAY 11, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of data-driven marketing services, seeks to employ the Beneficiary as a business systems analyst. It requests his classification as a professional under the third-preference immigrant category. *See* 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 with a bachelor's degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director concluded that the record did not establish the Beneficiary's possession of the experience required for the offered position.

On appeal, the Petitioner submits additional evidence and asserts the Beneficiary's possession of the required experience.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, a U.S. employer files an application for labor certification with the U.S. Department of Labor (DOL). DOL must certify that the United States lacks able, willing, qualified, and available workers for the offered position, and that a foreign national's employment will not hurt the wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Upon DOL certification, an employer then files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves a petition, a 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.

In visa petition proceedings, a petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In cases like this, a petition's priority date is the date the DOL received the labor certification

application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983).

II. ANALYSIS

The labor certification in this case states that, besides a bachelor's degree, the offered position of business systems analyst requires at least two years of experience. The experience may be in the job offered, or as a business analyst, analyst, or a related occupation.

The Beneficiary attested that, before the petition's priority date, he gained about 26 months of full-time, qualifying experience. He stated that he worked about eight months as a data architect for a company in South Korea, followed by about 18 months of employment by the Petitioner in the United States as an associate business systems analyst.

In support of the Beneficiary's claimed experience, the Petitioner submitted a letter from one of its project managers and a certificate from the Beneficiary's former employer in South Korea. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring the submission of letters from employers describing a beneficiary's experience). The Director concluded that, contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the former employer's certificate did not describe the Beneficiary's experience.

On appeal, the Petitioner submits a letter from a manager on the former employer's stationery, detailing the Beneficiary's prior job duties. The letter establishes the Beneficiary's possession of eight months of qualifying experience in South Korea. As stated in our notice of intent to dismiss (NOID) the appeal, however, the record did not demonstrate the Petitioner's employment of the Beneficiary for the claimed 18-month period. Specifically, letters on the Petitioner's stationery from the project manager and a human resources coordinator appeared to state that, during this period, another company employed the Beneficiary. Thus, the record did not support the Beneficiary's claimed experience with the Petitioner, or the Petitioner's intention to employ him in the offered position.

In response to our NOID, the Petitioner submits evidence that the letters did not refer to another company, but rather to a business segment of the Petitioner. Thus, the record on appeal establishes the Petitioner's prior employment of the Beneficiary and its intention to employ him in the offered position.[1]

[1] The Petitioner's NOID response also demonstrates its continuing ability to pay the proffered wage from the petition's priority date onward. *See* 8 C.F.R. § 204.5(g)(2).

Our NOID also questioned similarities between the offered position and the Beneficiary's prior position with the Petitioner. A labor certification employer generally cannot rely on experience that a foreign national gained with it, unless the experience was in a job substantially different than the offered position, or the employer demonstrates the impracticality of training another worker for the offered position. 20 C.F.R. §§ 656.17(i)(3)(i), (ii).

Here, the Petitioner asserts that the Beneficiary gained experience with it in a substantially different position. For this purpose, a substantially different position means one requiring performance of the same job duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

The letter from the Petitioner's project manager indicated that the offered position and the Beneficiary's prior position share some job duties. Because the letter did not indicate the amounts of time spent on job duties, the record did not establish the prior position as substantially different from the offered position.

In its NOID response, the Petitioner submits a letter from a senior manager of marketing operations, discussing differences between the two positions and stating percentages of time devoted to their job duties. The letter indicates that a worker in the offered position spends more than half of his or her time managing projects, analyzing data, and reporting business intelligence; duties that the Beneficiary did not perform in his prior job with the Petitioner. Thus, the record establishes the positions as substantially different, and the Beneficiary's experience with the Petitioner may be considered qualifying experience for the offered position.

III. CONCLUSION

The record establishes the Beneficiary's possession of the experience required for the offered position. We will therefore withdraw the Director's decision.

ORDER: The appeal is sustained.

Cite as *Matter of A-A-D-S-, Inc.*, ID# 102662 (AAO May 11, 2017)