U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-G- INC.

DATE: MAY 18, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an information technology (IT) consulting firm, seeks to employ the Beneficiary as a consultant specializing in enterprise software. It requests his classification under the third-preference immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Acting Director of the Nebraska Service Center denied the petition and the Petitioner's following motions to reopen and reconsider. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum experience required for the offered position.

On appeal, the Petitioner asserts that the Director erred in discounting evidence of the Beneficiary's experience and in finding discrepancies in his descriptions of his former job duties.

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

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain 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). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL certifies a position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a certified position and a requested immigrant classification. If USCIS approves a petition, a foreign national may finally 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.

II. THE MINIMUM EXPERIENCE REQUIRED

A petitioner must establish a beneficiary's possession, by a petition's priority date, of all DOL-certified job requirements.[1] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of a position. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g, Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the accompanying labor certification states the minimum requirements of the offered position of consultant as a U.S. high school diploma or a foreign equivalent credential, plus four years of experience in the job offered or as a systems analyst, programmer, or analyst. The Beneficiary's educational qualifications are not at issue.

On the labor certification, the Beneficiary attested that, before starting work for the Petitioner in temporary, nonimmigrant visa status in December 2012, he gained more than seven years of full-time, qualifying experience in India.[2] He stated that, from August 2003 to May 2005 and from November 2006 through July 2012, he worked for IT service providers as a manager - supply chain, senior executive - logistics, executive - parts and logistics, and coordinator.

As the Director noted, the Beneficiary's job titles in India do not match those of the offered position or the alternate, acceptable occupations listed on the labor certification. The Petitioner, however, argues that the offered position does not require experience under the listed job titles, but rather experience performing the job duties associated with the titles. The Petitioner asserts that the Beneficiary gained the requisite amount of experience in India performing the duties of the offered position.

The Petitioner's focus on job duties, rather than titles, accords with labor certification case law. *See, e.g., Matter of Sumeru Inc.*, 2013-PER-01241, 2017 WL 2315923 *3 (BALCA Apr. 24, 2017) (stating that, "[a]s the title given a job by an employer may not be determinative of the scope of duties and level of education and experience required, the Board's focus must extend to the underlying job duties for the position") (citation omitted). We therefore agree that, notwithstanding his former job titles, the Beneficiary would qualify for the offered position if he worked full-time for at least four years performing the job's primary duties. The certification states the primary duties of the offered position as: analyzing user requirements, procedures, and processes to automate or

[1] This petition's priority date is May 22, 2015, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] A labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience was obtained in a substantially different position than the one offered or the employer can demonstrate the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). The Petitioner here does not assert that the Beneficiary gained qualifying experience with it.

improve systems; documenting functional work flow; comparing current and desired levels of performance; and testing systems.

The record contains letters from three of the Beneficiary's former employers, confirming his claimed employment from November 2006 through July 2012. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring a petitioner to support a beneficiary's claimed, qualifying experience with letters from former employers).[3] A letter from one of the employers establishes the Beneficiary's experience from July 2011 to July 2012. Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), however, letters from the two other employers, covering November 2006 through July 2011, do not describe his experience. Moreover, one of the letters states that the Beneficiary's "roles and responsibilities were the same as a [] Consultant during the [software] implementation in our organization." But, contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the letter does not identify the Beneficiary's "roles and responsibilities." Also, the letter states his performance of the duties of a consultant "during the [software] implementation in our organization." The record does not indicate whether the implementation lasted through the Beneficiary's entire tenure with the employer, or whether the Beneficiary had different duties before and/or after the implementation. Therefore, the employers' letters do not establish the Beneficiary's possession of at least four years spent performing the primary job duties of the offered position.

The Petitioner submitted copies of e-mail messages in which the Beneficiary requested amended letters from the two former employers. Citing company policies, the employers declined to issue documents detailing his job duties. The Petitioner also submitted affidavits from the Beneficiary and former co-workers of his, detailing his job duties with the two employers. In addition, the Petitioner provided copies of appointment and resignation acknowledgement letters from the employers regarding the Beneficiary and the co-workers.

Although the documents support the Beneficiary's employment from November 2006 through July 2011, the record does not demonstrate the Beneficiary's experience performing the job duties of the offered position during that period, and as such it cannot be considered qualifying experience. As stated in the Director's notice of intent to deny, the Beneficiary's descriptions of his job duties during this period on a U.S. visitor visa application in July 2011 conflict with descriptions on the labor certification and the affidavits supporting his claimed experience. Asked on the visa application to describe his duties with the most recent former employer, the Beneficiary stated:

> Handling import & export operations, l[iais]on with customs and various other authorities for obtaining approvals, strategic planning[] & management, trading, logistics, operating, production control, vendor management, client relationship management, international trading operations.

[3] The Petitioner has not submitted letters from the employer where the Beneficiary's claims to have worked from August 2003 to May 2005. Nor has the Petitioner asserted that this prior employment should be considered qualifying employment for the offered position. As such, we can only evaluate the Beneficiary's experience based on the employment claimed from November 2006 through July 2012.

Asked on the application to describe his duties at the prior employer, he similarly stated: "Handling import export, l[iais]on."

As listed on the visa application, the Beneficiary's job duties with the two former employers reflect those of a "logistician," a position that involves using software systems to plan and track the movement of products, but that does not include installing, analyzing, or testing the systems as the job duties of the offered position require. *See* DOL, *Occupational Outlook Handbook*, "Logisticians," https://www.bls.gov/ ooh/ business-and-financial/logisticians.htm#tab-2 (last visited Apr. 12, 2018). This is inconsistent with the duties claimed on the labor certification and in the coworkers' affidavits, however, which include only tasks associated with the offered position, such as: analyzing user requirements; documenting work flow; testing systems; running server and database queries; and customizing and integrating modules of enterprise application software.

Also, as previously indicated, the Beneficiary attested on the labor certification that his former employers provided "IT Services." On their websites, however, the employers describe themselves as a provider of medical diagnostic solutions, a manufacturer of kitchen and bath products, an importer/exporter of automotive parts and raw materials, and a logistics company. By enhancing the Beneficiary's former job duties and identifying his former employers as providers of "IT Services," the certification apparently attempts to portray the Beneficiary as an experienced computer consultant. The discrepancies in the Beneficiary's job duties and the businesses of his former employers cast doubts on his experience performing the job duties of the offered position. *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).

In addition, the affidavits in support of the Beneficiary's claimed experience describe his job duties in virtually identical language. The similarities among the affidavits cast doubt on their reliability. *See id.* at 591 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the sufficiency and reliability of the remaining evidence of record).

On appeal, the Petitioner argues that, as sworn statements from those who are not parties to the proceedings and have personal knowledge of the events, the affidavits comply with regulatory requirements. *See* 8 C.F.R. § 103.2(b)(2)(i). The Petitioner contends that "[t]here is no regulatory or policy guidance mandating affidavits lack credibility simply by virtue [of] a standard format." An affidavit's compliance with regulatory requirements, however, does not require USCIS to accept the truth of its contents. As with all evidence, USCIS must consider an affidavit's relevance, probative value, and credibility. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (requiring a director to "examine each piece of evidence for relevance, probative value, and credibility"). The regulations do not directly address the evaluation of evidence. But USCIS policy requires consideration of an affidavit's credibility. *See* USCIS, *Adjudicator's Field Manual*, Ch. 11.1(h), https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2061/0-0-0-2073. html#0-0-0-312 (last visited Apr. 12, 2018) (stating that documentary evidence "is subject to the same considerations regarding competency and credibility as is testimonial evidence"). Federal courts have also discounted documents that contain significant similarities. *See, e.g, Nadeem v. Holder*,

599 F.3d 869, 873 (8th Cir. 2010) (affirming an Immigration Judge's disregard of letters from different witnesses that contain similar language, grammar, and spelling errors); *Mei Chai Ye v. U.S. Dep't of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (stating that nearly identical language in separate asylum affidavits may support an adverse credibility finding) (citation omitted).
Here, the extensive similarities in the language of the affidavits regarding the Beneficiary's claimed experience suggest that a single person drafted them. The affidavits therefore do not appear to constitute independent, objective evidence from multiple people with personal knowledge of the events. The affidavits' similarities therefore reduce their reliability.

The Petitioner also denies discrepancies in the Beneficiary's descriptions of his former job duties on the labor certification and the visa application. The Petitioner argues that, although the job duties on the certification are more detailed, the descriptions are not inconsistent. The Petitioner asserts that, while working for the two employers, the Beneficiary performed a broad range of duties, encompassing both technical and logistical tasks. Citing an affidavit of the Beneficiary and an expert opinion partially based on it, the Petitioner contends that some of the job duties listed on the certification include roles on the visa application, while others overlap.

We do not find the Petitioner's argument persuasive. As previously discussed, the job duties on the visa application describe administrative tasks, while those on the labor certification reflect technical, computer-related duties. If the Beneficiary's positions involved a combination of technical and administrative duties, the record does not explain why he listed only administrative duties on the visa application and only technical duties on the labor certification. The record also does explain how much time the Beneficiary purportedly spent on administrative duties with his former employers.

The expert opinion, from a community college professor of computer science, concludes that the job duties of the Beneficiary's prior positions on the labor certification "are nothing but detailed job functions of the broadly listed job duties" on the visa application. The opinion, however, also states that the job duties on the certification detail only some of the duties listed on the application, specifically "strategic planning[] & management, trading, logistics, operating, production control, vendor management, client relationship management, international trading operations." The opinion does not explain how much time the Beneficiary spent on the other duties, including "Handling import & export operations, l[iais]on with customs and various other authorities for obtaining approvals." The opinion therefore does not establish the Beneficiary's possession of at least four years of full-time experience performing the job duties of the offered position. *See Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (allowing an adjudicator to reject or afford lesser evidentiary weight to expert testimony that conflicts with other evidence or "is in any way questionable").

For the foregoing reasons, the record on appeal does not establish the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the Director's decision.

III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also 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 to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of consultant as $103,043 a year. As previously noted, the petition's priority date is May 22, 2015. The Petitioner submitted copies of financial statements for 2014 and 2015, and federal income tax returns for 2014. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record does not establish that the financial statements were audited. The record therefore lacks required evidence of the Petitioner's ability to pay in 2015, the year of the petition's priority date, and thereafter.

Also, USCIS records indicate the Petitioner's filing of at least 10 petitions for other beneficiaries that were pending or approved as of, or filed after, the priority date of the current petition.[4] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions from May 22, 2015, until the other beneficiaries obtained lawful permanent residence.[5] *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries).

In any future filings in this matter, the Petitioner must provide the proffered wages and priority dates of its other petitions. The Petitioner may also submit evidence of any wages paid to other beneficiaries after May 22, 2015, and of the denial, withdrawal, or revocation of any of the other petitions. Further, the Petitioner must provide copies of its annual reports, federal income tax returns, or audited financial statements for 2015, 2016, and, if available, 2017. The Petitioner may also submit additional evidence of ability to pay, including evidence in support of the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

IV. THE VALIDITY OF THE LABOR CERTIFICATION

[4] USCIS records identify the other petitions by the following receipt numbers:

[5] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered: after the other beneficiary obtains lawful permanent residence; if an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or before the priority date of the I-140 petition filed on behalf of the other beneficiary.

The record also does not establish the validity of the accompanying labor certification. If unaccompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for a skilled worker must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). USCIS may invalidate a certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

Here, asked on the labor certification "[I]s there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" the Petitioner indicated "No." Evidence, however, indicates that the Beneficiary's sister and her spouse own the petitioning corporation. On his 2011 visa application, the Beneficiary listed his sister as a U.S. citizen and resident. USCIS records identify her as the spouse of the Petitioner's senior vice president who signed this petition and the accompanying labor certification on behalf of the corporation. Copies of the Petitioner's 2014 federal income tax returns indicate that, together, the Beneficiary's sister and her spouse owned all of the company's stock. Also, public records indicate that the couple, together or separately, owned the homes the Beneficiary listed as his residences on the petition and certification. *See* , https: (last visited Apr. 12, 2018). Thus, contrary to the Petitioner's statement on the labor certification, the record indicates a family relationship between the company's owners and the Beneficiary.

"[T]he officers and principals of a corporation are presumed to be aware and informed of the organization and staff of their enterprise." *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1986). The Petitioner's misrepresentation on the labor certification therefore appears to be willful. The misrepresentation also appears to be material, as disclosure of the family relationship may have resulted in the labor certification's denial. *See, e.g, Matter of Johnman U.S.A., Inc.*, 2012-PER-03149, 2016 WL 6301766 *3 (BALCA Oct. 21, 2016) (stating that a family relationship between a foreign national and owners of a labor certification employer creates a presumption that the job is not clearly open to U.S. workers) (citations omitted); *see also* 20 C.F.R. § 656.10(c)(8) (requiring an employer to attest to the clear availability of a position to U.S. workers).

In any future filings in this matter, the Petitioner must submit copies of: its articles of incorporation; a list of all officers and shareholders, describing their relationships to each other and the Beneficiary; a financial history including the total investment in the corporation and the amount invested by each officer, shareholder, and the Beneficiary; and the name of the company official(s) exercising control or influence over hiring for the offered position. *See* 20 C.F.R. § 656.17(l).

Pursuant to the factors stated in *Matter of Modular Container Sys., Inc.*, 1989-INA-00228, 1991 WL 223955 *8 (BALCA July 16, 1991 (*en banc*), the Petitioner should also submit evidence of the *bona fides* of the job opportunity. The Petitioner's evidence should include copies of documentation supporting its labor certification, including: its notice of filing; its job order with a state workforce agency; its request for a prevailing wage determination; newspaper advertisements; ads with its employee referral program, a private employment firm, and a job-search website; its recruitment report; and any resumes/applications received from U.S. workers. If not resolved, the issues

discussed above would be grounds for a finding of fraud or willful misrepresentation and invalidation of the labor certification.

V. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of D-G- Inc.*, ID# 1224201 (AAO May 18, 2018)