U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-C- LLP

DATE: MAY 24, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a management consulting company, seeks to employ the Beneficiary as a senior consultant. It requests classification of the Beneficiary as a professional under the third preference immigrant category. 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" immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director found that the Petitioner did not establish that the Beneficiary met the minimum experience requirement of the labor certification, and therefore did not qualify for the proffered position or for the requested classification.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor 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). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, 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.

To qualify for classification as a professional a beneficiary must have a U.S. baccalaureate degree or a foreign equivalent degree. 8 C.F.R. § 204.5(l)(3)(ii)(C). A beneficiary must also meet the specific educational, training, experience, and other requirements of the labor certification. 8 C.F.R.

§ 204.5(l)(3)(i). All requirements must be met by the petition's priority date.[1] *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

II. ANALYSIS

At issue in this case is whether the Beneficiary has the qualifying experience required by the terms of the labor certification.

The labor certification that accompanied the Petitioner's Form I-140, Immigrant Petition for Alien Worker, states in section H, boxes 6, 10/10-A, and 10-B, that the minimum experience required for the job of senior consultant is 24 months in the job offered or in an alternate occupation such as bioinformatics engineer, data analyst, consultant, or a related job. In addition, some specific experience requirements are listed in box H.14 of the labor certification. According to the labor certification (section K, boxes a and b) the Beneficiary exceeded the 24-month experience requirement by working as a consultant for the Petitioner beginning in October 2015 and ongoing as of June 2018 (when the labor certification was filed), and prior to that as a bioinformatics engineer for [redacted] in [redacted] Georgia, from March 2012 to October 2015.

With its initial evidence the Petitioner submitted a letter stating that the Beneficiary had been employed as a consultant from October 2015 to August 2018, and since August 2018 as a senior consultant. The letter described the duties performed in those two positions. No letter was submitted from [redacted] to confirm the Beneficiary's prior employment with that company. In response to a request for evidence (RFE) from the Director seeking further evidence of the Beneficiary's experience, the Petitioner submitted another virtually identical letter confirming the Beneficiary's employment with the Petitioner, emphasizing that the position of consultant and senior consultant were not substantially comparable and asserting that the Beneficiary gained experience in the skills required at H.14 "during the entire course of employment" with the company. Once again, no employment verification letter was submitted from [redacted].

In denying the petition, the Director cited the Petitioner's answer of "No" to the question at section J.21 of the labor certification, which asks: "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?" According to the Director, the Petitioner's "No" answer to the question at J.21 conflicted with a statement in its second employment verification letter that "the beneficiary gained the necessary experience to satisfy the position's minimum requirements through the experience she gained while employed by our organization." The Director concluded that "the Petitioner failed to submit evidence" that the Beneficiary had the requisite 24 months of experience required by the labor certification.

The Director's decision was incorrect, because it denied the petition on the basis of that alleged statement and the Petitioner's answer of "No" at J.21 without addressing the decisive issue in J.21 of

[1] The priority date of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). In this case the priority date is June 8, 2018.

whether the Beneficiary's experience with the Petitioner was in a "substantially comparable" position to the job offered, or not. The labor certification query at J.21 derives from the regulations governing job duties and requirements in the labor certification process, which provide, in pertinent part:

> If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
>
> (i) The alien gained the experience while working for the employer, including as a contract employee, in a position **not substantially comparable** to the position for which certification is being sought [**emphasis added**], or
>
> (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

20 C.F.R. § 656.17(h)(4)(i)(3)(i) and (ii). For purposes of paragraph (i) above, the regulations go on to define "substantially comparable" as follows:

> A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

20 C.F.R. § 656.17(h)(4)(i)(5)(ii).

On appeal the Petitioner references its previously submitted employment verification letters, which describe seven job duties of the consultant position the Beneficiary held with the Petitioner from October 2015 to August 2018 (which accord with those described at section K.a of the labor certification), seven job duties of the senior consultant position that the Beneficiary began with the Petitioner in August 2018 (which accord with the duties of the job offered described at section H.11 of the labor certification), and eight items of experience gained by the Beneficiary in both positions (which accord with the specific experience requirements at section H.14 of the labor certification). The employment verification letters contend that the job of consultant is not substantially comparable to the job of senior consultant because it does not require that the same duties be performed more than 50% of the time and it does not include nearly as much supervisory responsibility. According to the Petitioner, therefore, the Beneficiary's employment as a consultant is qualifying experience for the proffered position of senior consultant.

Upon review, we find that the Petitioner has demonstrated that the position of consultant is not substantially comparable to that of senior consultant. As such, the Beneficiary may qualify for the

offered job based on her experience with the Petitioner and has satisfied the requirement of two years of experience in the job offered or as a bioinformatics engineer, data analyst, consultant, or a related job. However, the record does not establish that the Beneficiary has the experience required by section H.14 of the labor certification. As noted above, the letter submitted by the Petitioner states that the Beneficiary gained the experience listed in H.14 "during the entire course of employment" with the Petitioner, but it does not specify that the experience was gained solely in the position of consultant or that the Beneficiary has the required two years of experience with each special skill. The specific skills experience would only be qualifying if gained prior to the Beneficiary's employment in the offered position. On remand, the Director should give the Petitioner an opportunity to address this issue and provide evidence of the Beneficiary's qualifications.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of whether the Beneficiary meets the minimum experience requirement of the labor certification.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of D-C- LLP,* ID# 4538218 (AAO May 24, 2019)