U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-, INC.

DATE: NOV. 28, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of software consulting services, seeks to employ the Beneficiary as a programmer analyst. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This 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 Director of the Texas Service Center denied the petition. The Director concluded that the record did not establish, as required, the Beneficiary's possession of the experience required for the offered position and the requested classification.

On appeal, the Petitioner submits additional evidence and asserts that it has now established the Beneficiary's qualifications for the offered position and the requested classification.

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

I. LAW

Employment-based immigration is generally a three-step process. First, a U.S. employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (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). Next, the employer must file a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves the immigrant visa 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.

II. BENEFICIARY QUALIFICATIONS

A petitioner must establish a beneficiary's possession of all the experience specified on an accompanying labor certification by a petition's priority date.[1] 8 C.F.R. § 103.2(b)(l), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). As previously noted, a skilled worker must also possess at least two years of training or experience. Section 203(b)(3)(A)(i) of the Act.

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 K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

Here, the labor certification states that 24 months of experience as a programmer analyst is the minimum experience requirement of the offered position, or 24 months of experience either providing programmer or technical support or as a computer technician. On the labor certification, the Beneficiary attested that he had at least 24 months of full-time, qualifying experience with prior employers as follows:

Job title	Employer name	Employer address	Start date	End date
Programmer/analyst		Illinois	12/01/2005	07/13/2006
Programmer/tech support		Ireland	08/01/2004	08/31/2005
Computer technician		India	06/01/2003	07/20/2004

A petitioner must support a beneficiary's claimed qualifying experience with a letter from an employer. 8 C.F.R. § 204.5(g)(1). The letter must provide the name, address, and title of an employer, and a description of a beneficiary's experience. *Id.* Here, the Petitioner did not initially provide letters from the Beneficiary's purported former employers attesting to his experience. Instead, in response to a request for evidence (RFE), the Petitioner submitted an employment offer from and letters from individuals who attested that they were aware that the Beneficiary worked for the above entities; however, this information does not satisfy the regulatory requirement for experience letters from former employers. The regulation at 8 C.F.R. § 204.5(g)(1) allows for the consideration of other documentation relating to a beneficiary's experience or training if the experience letters from former employers are unavailable. The Petitioner submitted letters and mail tracking receipts that it claimed show the Beneficiary had sought these letters from its employers and asserted that his employers were unable or unwilling to respond. However, in one case, the Beneficiary appears to have sought

[1] In this case, the petition's priority date is November 16, 2006. This is the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

employment verification from an entity that he did not previously claim as an employer. Specifically, he sought a response from [redacted] but had named [redacted] on the labor certification. In addition, the mail tracking receipts show only that one mail item was delivered in [redacted] India and signed for by ' [redacted] and that another mail item was delivered in [redacted] Ireland, and signed for by [redacted] The letters and tracking information do not establish the identities of the individuals who signed for the mail, and whether they worked for [redacted] (or [redacted] and [redacted] Moreover, even if the mail information shows the Beneficiary sought experience letters from his prior employers, the lack of response in the record is not sufficient to demonstrate that the companies refused to respond and that experience letters are consequently unavailable. For example, as will be discussed, the Petitioner eventually provided a letter from [redacted] on appeal; therefore, at least one of the Beneficiary's prior employers appears to have been willing to provide employment verification.

The letters from the individuals who attested that they were aware that the Beneficiary worked for the above entities do not contain probative details that establish his employment. For example, [redacted] and [redacted] separately stated that they knew the Beneficiary while he was working for [redacted] however, the Beneficiary indicated that the name of his employer was [redacted] therefore, the [redacted] statements are not consistent with the Beneficiary's claims. In addition, although the [redacted] each stated that the Beneficiary worked at [redacted] from June 1, 2003, to July 20, 2004, and provided detailed lists of his alleged duties, they do not claim to have been co-workers or otherwise explain why they would have such detailed knowledge of the Beneficiary's work.

In addition, [redacted] and [redacted] separately stated that they knew the Beneficiary while he was working for [redacted] from August 1, 2004, to August 31, 2005, and listed his alleged duties. Although these individuals stated they had personal knowledge of the Beneficiary's work at [redacted] they did not claim to have been co-workers. Moreover, they both claimed to reside in [redacted] India on their affidavits, but did not otherwise explain why they would have such detailed knowledge of the Beneficiary's work in Ireland.

Another individual named [redacted] stated that he had worked at [redacted] from December 2005 until June 2007, and that the Beneficiary worked there with him from December 2005 until June 2006. However, the Beneficiary had stated that he worked at [redacted] until July 13, 2006; therefore, [redacted] statement is inconsistent with the Beneficiary's own claims. Considering the deficiencies and discrepancies noted, the letters are not sufficient to establish that the Beneficiary has the claimed experience.

Moreover, the Beneficiary's claims on the labor certification and the information in the letters are inconsistent with other information in the record regarding the Beneficiary's work history. The inconsistencies cast doubt on the Beneficiary's claims and the evidence of his prior qualifying experience. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved

material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

USCIS records show that the Beneficiary submitted a Form G-325A, Biographic Information, on which he listed his experience in the United States prior to working at the Petitioner, as follows:

Job title	Employer name	Employer address	Start date	End date
Programmer/analyst		Illinois	December 2005	May 2006

The Beneficiary also listed his last occupation abroad on the Form G-325A as follows:

Job title	Employer name	Employer address	Start date	End date
Programmer/ technical support		Ireland	December 2003	March 2005

The Beneficiary's employment claims on the Form G-325A relating to and are not consistent with the employers and dates of employment that he claimed on the labor certification. Moreover, the end date of May 2006 is inconsistent with the July 13, 2006, end date that the Beneficiary listed on the labor certification and the June 2006 reflected in statement. Finally, the Beneficiary claimed on the Form G-325A that he lived in Ireland from September 2003 to August 2005, which contradicts his claim on the labor certification to have gained qualifying experience as a computer technician in India from June 2003 to July 2004.

After an interview with USCIS on May 6, 2013, and in response to a related RFE, the Beneficiary submitted a letter dated May 17, 2013, in which he asserted that he had worked at " [sic]" from March 2006 to May 2006," and included an Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement as evidence that he was paid $4,000 for these claimed months of work. The Beneficiary's statement that he worked for for two to three months between March 2006 and May 2006 is inconsistent with the claim on the Form G-325A to have worked there from December 2005 to May 2006, and is also inconsistent with his experience claims on the labor certification.

We informed the Petitioner of the above derogatory information in a notice of intent to dismiss (NOID) the appeal, and the Petitioner responded with a statement from the Beneficiary and additional evidence. In his new statement, the Beneficiary maintains that his employment history as reflected on the labor certification is accurate. The Beneficiary claims that he tried to file his Form I-485, Application to Register Permanent Residence or Adjust Status, and supporting evidence as quickly as possible after the U.S. Department of State issued a visa bulletin in June 2007, advising of a huge jump in the cut-off date for third employment preference visas for Indian nationals. The Beneficiary asserts that because he was in a rush to file his Form G-325A, it "contains substantial errors and . . . [he] did not catch them all before signing" and submitting it, and that certain periods of his employment for (i.e., before March 2006 and after May 2006) are undocumented because they did not pay him with

money. For example, according to the Beneficiary, when he stopped working for clients in May 2006, he continued to work in-house for the company solely for meals and lodging until July 2006. The Beneficiary states that any information on the Form G-325A that is inconsistent with his representations on the labor certification must be due to the misunderstanding of "whoever completed" the Form G-325A at the law firm that formerly represented him. Similarly, the Beneficiary denies recollection of the May 2013 letter and contends that the letter and other documents with contradictory information discussed in our NOID "were all prepared by [his former] lawyers."

The Beneficiary's claim to have provided incorrect information on his Form G-325A because of his rush to file is not supported by other information in his Form I-485 and supporting documents. The Beneficiary's Form I-485 record shows that when USCIS interviewed him on May 6, 2013, the interviewing officer made handwritten amendments to the Form G-325A to show the Beneficiary's employment and residences from 2009 to the date of interview, but there are no notations reflecting that the Beneficiary sought to amend other employment and residence information that he now claims is incorrect.

Moreover, the Beneficiary does not identify an individual whom he claims incorrectly completed the Form G-325A and May 2013 letter on his behalf, nor does he include, for example, a letter from his former attorneys confirming that contradictory employment information in the May 2013 letter and Form G-325A is based on a misunderstanding and should be attributed to them rather than the Beneficiary. To the extent that the Beneficiary may be suggesting that contradictory, and therefore derogatory, information is the fault of his prior attorneys, his assertion that one or more unidentified attorneys is responsible does not satisfy the requirements for establishing a claim of ineffective assistance of counsel. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel). Consequently, the record reflects that the Beneficiary provided contradictory information on the Form G-325A and May 2013 letter, and the Petitioner's response to our NOID, as discussed below, does not resolve the inconsistencies between those documents and the claims made on the labor certification.

In response to our NOID, the Petitioner includes previously submitted documents from offering the Beneficiary a permanent position as computer programmer or technical support in August 2004. However, this document is not accompanied by any other evidence establishing the duration of the Beneficiary's employment with and does not resolve the inconsistent end date provided on the labor certification and Form G-325A. The letter also does not address whether the Beneficiary was already working for them in another position or on a temporary or probationary basis prior to August 2004, as claimed on the Form G-325A, which if true contradicts the Beneficiary's claimed employment with The Petitioner also submits a letter from stating that the Beneficiary worked at in India from June 2003 until July 2004. However, given the inconsistencies regarding the dates of employment, this letter, unaccompanied by additional documentary evidence, such as pay stubs establishing the duration of the Beneficiary's employment, is insufficient to establish the claimed experience. A petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where

the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Consequently, without additional, objective evidence of the Beneficiary's prior employment, the two employment letters are not sufficient to resolve the contradictory information.

Finally, the Petitioner provides a police certificate from the [redacted] in [redacted] Ireland, stating that the Beneficiary was not convicted of any crime while residing in Ireland. In his statement, the Beneficiary claims that this certificate shows he was not in Ireland prior to August 2004. Although the police certificate lists the Beneficiary's former residence in [redacted] and the dates of August 14, 2004, to August 14, 2005, there is no additional information showing that the [redacted] independently verified the Beneficiary's place and dates of residence without relying solely on the Beneficiary's representations. The Beneficiary also includes a copy of his passport, claiming that it shows his first entry to Ireland was in August 2004, and therefore establishes that he could not have been working for [redacted] in Ireland prior to that date. However, the document appears to be a partial copy of the Beneficiary's passport because the first numbered page begins on page 10 and the entire copy consists of 32 pages, whereas the shortest passport issued by the Consular, Passport & Visa Division of the Ministry of External Affairs in India is 36 pages.[2] Consequently, this additional evidence from the Beneficiary is not sufficient to establish that he first entered Ireland in August of 2004.

Accordingly, based on the above conflicting information about the Beneficiary's employment history, the Petitioner has not submitted sufficient evidence to establish that the Beneficiary has the qualifying experience required for the position of programmer analyst or for classification as a skilled worker.

III. ABILITY TO PAY

Although not addressed 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).[3] Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS considers whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and the wages paid. If net income and net

[2] *Fee Structure*, http://passportindia.gov.in/AppOnlineProject/onlineHtml/feeDocument.html (last visited on October 26, 2017).

[3] This petition's priority date is the date the DOL received the accompanying labor certification for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

current assets are insufficient, USCIS may also consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[4]

Here, the accompanying labor certification with a priority date of November 16, 2006, states the proffered wage of $47,466 per year. The record contains tax returns for 2006 through 2012, but does not contain a form of regulatory required evidence for any subsequent year.[5]

The Petitioner submitted Forms W-2 for the Beneficiary from 2006 to 2014. From 2007 through 2014, the Petitioner paid the Beneficiary in excess of the proffered wage; however, in 2006 the Petitioner paid the Beneficiary less than the proffered wage. According to the Petitioner's tax returns from 2006, it had sufficient net income to cover the difference between the proffered wage and the wages paid. However, where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner filed multiple I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other I-140 petitions that were pending or filed after the priority date of the current petition.[6] We only consider the other beneficiaries for any year that the Petitioner has not paid the Beneficiary a salary equal to or greater than the proffered wage.

In any future filing in this matter, the Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other I-140 petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, or beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. Absent such information, we cannot find that the Petitioner had the ability to pay in 2006. If the Petitioner pursues this matter, it must also submit a form of regulatory required evidence of its ability to pay from 2013 onward[7] and evidence of its ability to pay this Beneficiary and the beneficiaries of its other I-140 petitions from 2015 to present.

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[4] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292 (5th Cir. 2015).

[5] We note the submission of a 2013 audited financial statement, but the company named in the document is not the Petitioner. The Petitioner has not explained this discrepancy.

[6] 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.

[7] The record contains regulatory required evidence of the Petitioner's ability to pay in the form of tax returns for 2006 to 2012.

IV. CONCLUSION

The record does not establish the Beneficiary's possession of the experience required for the offered position and the requested classification.

ORDER: The appeal is dismissed.

Cite as *Matter of V-, Inc.*, ID# 527147 (AAO Nov. 28, 2017)