U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-E-S- INC

DATE: OCT. 19, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an elementary school, seeks to employ the Beneficiary as a kindergarten teacher. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. 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 Nebraska Service Center denied the petition. The Director found that the labor certification does not require at least a bachelor's degree, and therefore does not support the requested classification of professional.

On appeal the Petitioner submits a brief and supporting documents, many of which were already in the record. The Petitioner asserts that the proffered position requires both a bachelor's degree and teaching experience, that the Beneficiary meets both the educational and the experience requirements for the job, and that the petition should be approved.

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).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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.

[1] The date the labor certification is filed with the DOL – in this case, July 21, 2016 – is the "priority date" of the subsequent petition *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

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 applies 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. ANALYSIS

A. Minimum Requirements of the Labor Certification

The first issue before us is whether the labor certification supports the requested classification of professional.[2] In order to determine the minimum requirements of a job opportunity, we must examine "the language of the labor certification job requirements." *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the employment certification application form. *Id.* at 834.

For the beneficiary of an I-140 petition to be eligible for professional classification, the labor certification must require, at a minimum, a U.S. baccalaureate degree or a foreign equivalent degree. *See* 8 C.F.R. § 204.5(l)(3)(ii)(C). Section H of the labor certification sets forth the minimum education, training, experience, and other requirements to qualify for the proffered position. In this case, the labor certification states the following with respect to the minimum requirements for the job of kindergarten teacher:

H.4.	Education: Minimum level required:	Bachelor's degree
H.4-B.	Major Field of Study:	English
H.5.	Is training required for the job?	No
H.6.	Is experience in the job offered required?	Yes
H.6-A.	How long?	36 months
H.7.	Is an alternate field of study acceptable?	No
H.8.	Is an alternate combination of education and experience acceptable?	Yes
H.8-A.	What level of education?	Other
H.8-B.	If "Other" – What alternate level?	Teaching experience
H.8-C.	How much experience?	3 years
H.9.	Is a foreign educational equivalent acceptable?	Yes
H.10.	Is experience in an alternate occupation acceptable?	No

Section H.14 (Specific skills or other requirements) includes the following additional language:

[2] In its Form I-140, Immigrant Petition for Alien Worker (I-140 petition), the Petitioner checked the box at part 2.1.e. which specifies that the petition is being filed for "[a] professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree)."

> At least 3 years of full-time classroom experience; A demonstrated track record of propelling student academic growth and mastery; A Bachelor's degree.

In his decision the Director found that the labor certification did not require the minimum of a bachelor's degree to qualify for the job of kindergarten teacher. Rather, the labor certification indicated in sections H.8, H.8-A, H.8-B, and H.8-C that "teaching experience" could substitute for a bachelor's degree and with three years of experience could qualify a beneficiary for the job. The Director concluded that since the labor certification required "less than a Bachelor's degree" it did not support the petition for professional classification.

On appeal, the Petitioner asserts that the job of kindergarten teacher requires a bachelor's degree and at least three years of classroom experience, that its job advertisements stated these requirements, and that the labor certification stated these requirements as well in sections H.4 to H.8 and in H.14. As the Petitioner points out, the Director did not take the language in section H.14 into consideration in denying the petition. Therefore, the Director's analysis of the labor certification language regarding the minimum educational requirement for the job opportunity was incomplete. Accordingly, we will remand this case for further consideration of the minimum educational requirement of the labor certification, and whether it supports the requested classification of professional.

B. Beneficiary's Experience

On remand the Director shall also determine whether the Beneficiary meets the experience requirements of the labor certification. A beneficiary must meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). While the labor certification in this case appears to require three years of qualifying experience, the only job experience for the Beneficiary listed on the labor certification is a position as preschool and elementary teacher with the Petitioner starting in 2010, for which no employment verification letter has been submitted. The regulation at 8 C.F.R. § 204.5(g)(1) provides that "[e]vidence relating to qualifying experience . . . . shall be in the form of letter(s) from current or former employers." The only employment verification letters in the record are from two schools claiming to have employed the Beneficiary in teaching positions in earlier years, but neither of those jobs is listed on the labor certification. Furthermore, it is not clear that the letters indicate sufficient time in an acceptable position in order to meet the terms of the labor certification. If deemed necessary on remand, the Director may request further evidence from the Petitioner relating to the Beneficiary's employment history.

C. Petitioner's Ability to Pay the Proffered Wage

On remand the Director shall also determine whether the Petitioner has the ability to pay the proffered wage of the teaching position at issue in this proceeding, which the labor certification states is $65,000 per year. As provided in the regulation at 8 C.F.R. § 204.5(g)(1), "[t]he petitioner

must demonstrate this ability at the time the priority date is established [July 21, 2016, in this case] and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." Thus, the Petitioner must submit either an annual report, or a federal tax return, or an audited financial statement for each of the years 2016 and 2017 to comply with the above regulation. No such materials are in the record. On remand, therefore, the Director may request such documentation from the Petitioner and any other evidence that may be deemed pertinent in determining the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of whether the minimum educational requirement of the labor certification supports the requested classification of professional, whether the Beneficiary meets the experience requirements of the labor certification, and whether the Petitioner can establish its ability to pay the proffered wage of the job offered from the priority date onward.

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 S-E-S- Inc*, ID# 1699622 (AAO Oct. 19, 2018)