U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12260062

Date: OCT. 27, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, a provider of software-based platforms and applications for interactive television and digital media, seeks to employ the Beneficiary as director, account management. The company requests his classification under the third-preference, immigrant visa category for professionals. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner didn't demonstrate the Beneficiary's possession of the minimum educational requirements of the offered position or the requested immigrant visa category.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 169, 175 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved labor 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 noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a designated noncitizen 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. THE EDUCATIONAL REQUIREMENTS

A petitioner for a professional must demonstrate that a beneficiary holds at least a U.S. bachelor's degree or a foreign equivalent degree. 8 C.F.R. § 204.5(l)(3)(ii)(C). The evidence must include "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." *Id.*

A petitioner must also establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. 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 "DOL bears authority for setting the *content* of the labor certification") (emphasis added).

The accompanying labor certification states the minimum educational requirements of the offered position of director, account management as a U.S. bachelor's degree, or a foreign equivalent degree, in engineering. The petition's priority date is June 6, 2019, the date 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).

On the labor certification, the Beneficiary attested that, by the petition's priority date, a university in the United Kingdom awarded him a bachelor's degree in engineering. The Petitioner submitted a copy of a diploma from the U.K. university, indicating the Beneficiary's receipt of a bachelor of engineering degree in "engineering with business" in 1998. The Petitioner also submitted an independent, professional evaluation finding the degree equivalent to a U.S. bachelor's degree in engineering.

In a request for additional evidence, the Director asked the Petitioner to provide transcripts of the Beneficiary's university studies. The Petitioner responded that transcripts were unavailable but provided copies of examination results for the Beneficiary's last two years of university studies and letters from school officials confirming his receipt of the degree.

The Director noted that one of the university letters states the Beneficiary's attendance at the school from September 1995 to June 1998, or three academic years. A U.S. bachelor's degree usually requires at least four academic years of study. *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977). Also, the Director noted that counsel's assertion of the unavailability of the Beneficiary's university transcripts didn't constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The Director therefore concluded that the record didn't demonstrate the Beneficiary's possession of a foreign equivalent of a U.S. baccalaureate degree in engineering.

As the Petitioner argues on appeal, however, the Director overlooked evidence. The university letters state the unavailability of the Beneficiary's transcripts, citing the "age of the record" and the school's legal responsibility to retain transcripts for only five years after corresponding students complete their studies. Thus, evidence - not merely assertions of counsel - supports the unavailability of the Beneficiary's university transcripts.

Also, the Petitioner submitted a copy of a report from the Electronic Database for Global Education (EDGE). Federal courts consider EDGE to be a reliable source of information about foreign credentials equivalencies.[1] The EDGE report concludes that a three-year, bachelor of engineering degree from a U.K. university equates to a U.S. bachelor's degree in engineering. Also, the EDGE report and a letter from the evaluator indicate that the Beneficiary's U.K. university admission required his completion of two "general certificates of education advanced level," equating to one year of U.S. university. A preponderance of evidence therefore demonstrates the Beneficiary's possession of a foreign degree equating to a four-year, U.S. baccalaureate. We will therefore withdraw the Director's contrary decision.

The Petitioner, however, hasn't demonstrated the Beneficiary's possession of a bachelor's degree in the field of study required for the offered position. The labor certification states the offered position's need for a baccalaureate in "engineering." The certification states that the Petitioner won't accept a degree in a related field. As previously indicated, the Beneficiary's diploma describes his degree as a baccalaureate in "engineering with business."

A letter from the school where the Beneficiary studied states that the "engineering with business" program provides students with "a broad understanding of engineering, including mechanical and electronic, relevant practical and technical expertise and supporting business knowledge." The Beneficiary's examination results indicate his passage of exams in: manufacturing systems; marketing for engineers; money in business; computer applications; continuous improvement; instrumentation & control systems; project planning and management; integrated electronics; manufacturing systems strategy and design; project feasibility; projects 1 and 2; law; systems modeling; business strategy; and computers in engineering. The evaluation submitted by the Petitioner describes the Beneficiary's degree as the equivalent of a U.S. baccalaureate in "engineering." But the evaluation doesn't discuss the business coursework included in the Beneficiary's curriculum or explain how his degree in "engineering with business" equates to a U.S. baccalaureate in "engineering." The immigration service may reject or afford lesser evidentiary weight to expert testimony that conflicts with other evidence or "is in any way questionable." *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). The record therefore doesn't establish the Beneficiary's possession of a baccalaureate in the offered position's required field of study.

The Director didn't notify the Petitioner of this evidentiary deficiency. We will therefore remand the matter. On remand, the Director should inform the Petitioner of its need to demonstrate the Beneficiary's possession of a bachelor's degree in the required field of study.

III. THE EXPERIENCE REQUIREMENTS

The record also doesn't establish the Beneficiary's possession of the minimum employment experience required for the offered position.

[1] EDGE was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), a non-profit, voluntary group of more than 11,000 higher-education professionals representing about 2,600 institutions in more than 40 countries. *See* AACRAO, "Who We Are," https://www.aacrao.org/who-we-are (last visited Aug. 12, 2021); *see also, e.g., Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (describing EDGE as "a respected source of information").

In addition to a bachelor's degree in engineering, the labor certification states that the offered position of director, account management requires at least five years of experience in the job offered or as a "Manager, Video Product Development." Also, part H.14 of the labor certification, "Specific skills or other requirements," states that all of the requisite five years of experience must include: "working with video service providers in product and/or engineering roles;" "in software development and cable services industry;" "in new product development at a video service provider or selling new products to video service providers;" and "in the technical infrastructure of video distribution infrastructures."

On the labor certification, the Beneficiary attested that a company employed him in Canada as a manager, video product development for more than six years, from 2007 to 2014. To support claimed qualifying experience, a petitioner must submit a letter from a beneficiary's former employer. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must contain the employer's name, title, and address, and describe the Beneficiary's experience. *Id.*

Consistent with the information on the labor certification, the Petitioner submitted a notice from a vice president of the Canadian company stating its employment of the Beneficiary as a manager, video product development from December 2007 to February 2014. Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), however, the notice doesn't describe the Beneficiary's experience. The notice therefore doesn't establish the Beneficiary's qualifying experience in the job offered or the alternate occupation.

The Petitioner also submitted a letter from a director of the Canadian company. The director's letter describes the Beneficiary's duties. But the letter confirms the Beneficiary's employment and describes his experience from December 2007 to only an unspecified month or day in 2012, when the letter's signatory stated he stopped directly supervising the Beneficiary. The letter therefore doesn't establish the Beneficiary's qualifying experience for the requisite period of five years.

Also, the director's letter doesn't detail the nature of the Canadian company's business at the time of the Beneficiary's tenure. Thus, contrary to the additional requirements listed in part H.14 of the labor certification, the record doesn't establish the Beneficiary's work with "video service providers," "in software development and cable services industry," "in new product development at a video service provider or selling new products to video service providers;" or "in the technical infrastructure of video distribution infrastructures."

On remand, the Director should ask the Petitioner for additional evidence establishing the Beneficiary's possession of at least five years of qualifying experience.

IV. ABILITY TO PAY THE PROFFERED WAGE

The record also does not establish the Petitioner's ability to pay the proffered wage of the offered position. 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 generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

The labor certification states the proffered wage of the offered position of director, account management as $147,618 a year. As previously indicated, the petition's priority date is June 6, 2019.

The Petitioner submitted audited financial statements for 2017 and 2018, and more recent payroll records and money market and bank account statements. But the record lacks regulatory required copies of an annual report, federal tax return, or audited financial statements for 2019, the year of the petition's priority date, or thereafter. The record therefore doesn't establish the Petitioner's ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." *See* 8 C.F.R. § 204.5(g)(2).

Also, USCIS records indicate the Petitioner's filing of Form I-140 petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition that it files. 8 C.F.R. § 204.5(g)(2). This Petitioner therefore must demonstrate its ability to pay the combined proffered wages of this and any other of its petitions that were pending or approved as of this petition's priority date or filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner didn't demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

USCIS records indicate the Petitioner's filing of at least three Form I-140 petitions for other beneficiaries that were pending or approved as of June 6, 2019, or filed thereafter.[3] The record doesn't contain the proffered wages or priority dates of the other petitions. USCIS therefore can't calculate the combined proffered wages that the Petitioner must demonstrate its ability to pay. For this additional reason, the record doesn't establish the Petitioner's ability to pay the proffered wage.

On remand, the Director should ask the Petitioner to provide the proffered wages and priority dates of its other petitions. Also, regulatory required evidence of the Petitioner's ability to pay the proffered wage from the petition's priority date onward should now be available. The Director therefore should also ask the Petitioner for copies of annual reports, federal tax returns, or audited financial statements for 2019 and 2020. The Petitioner may also submit additional evidence of its ability to pay the combined proffered wages in relevant years, including proof of any wages it paid to applicable beneficiaries in relevant years or materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

V. VALIDITY OF THE LABOR CERTIFICATION

Finally, the record doesn't establish the validity of the accompanying labor certification. Unless accompanied by an application for Schedule A designation, a petition for a professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i).[4] A labor certification remains valid

[2] The Petitioner needn't demonstrate its ability to pay proffered wages of petitions that it withdrew or, unless pending on appeal or motion, that USCIS rejected, denied, or revoked. The Petitioner also needn't demonstrate its ability to pay proffered wages before the priority dates of their corresponding petitions or after their corresponding beneficiaries obtained lawful permanent residence.

[3] USCIS records identify the other petitions by the following receipt numbers: [redacted]; [redacted]; and [redacted].

[4] The regulation also allows "documentation to establish that the alien qualifies for one of the shortage occupations in the

only for the "particular job opportunity," noncitizen, and geographical area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). Also, an employer must list a valid federal employer identification number (FEIN) on a labor certification. 20 C.F.R. § 656.3 (defining the term "employer").

The accompanying labor certification identifies a job offer for director, account management by [redacted] Notes to the Petitioner's audited financial statements for 2017 and 2018, however, state that that Delaware limited liability company (LLC) "was dissolved" after August 2015 and that another LLC constitutes "a continuation" of the first one. Also, USCIS records indicate that, in 2016, a Form I-140 petition in the name of the same "dissolved" LLC listed a different FEIN than the one stated on this Form I-140 and accompanying labor certification. *See* [redacted] Thus, the record doesn't demonstrate the validity of the labor certification employer's stated FEIN or the employer's existence at the time of the application's filing in 2019. Further, the Petitioner's website indicates that, in June 2020, while this appeal was pending, another firm acquired the Petitioner. The record therefore doesn't establish the labor certification's validity for "the particular job opportunity" stated on it.

A petitioner may use the labor certification of another employer only if the petitioner establishes itself as the employer's "successor in interest." *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). For immigration purposes, a successor in interest must acquire the rights and liabilities needed to carry on the labor certification employer's business or a discrete part of it. A successor must: 1) demonstrate that, except for the change of employer, the job opportunity remains materially the same as listed on the labor certification; 2) describe and document the transaction(s) by which the successor acquired control of the labor certification business; and 3) demonstrate eligibility for the requested benefit, including the abilities of the original employer, the successor, and any intervening owners to continuously pay the proffered wage of the offered position. *Id.* at 482-83.

On remand, the Director should ask the Petitioner for additional evidence establishing its acquirer as a successor in interest of the labor certification employer. The Petitioner must also demonstrate the existence of the labor certification employer at the time of the application's filing and explain the entity's apparent use of two, different FEINs. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

If supported by the record, the Director may notify the Petitioner of any additional, potential grounds of denial. On remand, the Director should afford the Petitioner a reasonable opportunity to respond to all issues raised. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

VI. CONCLUSION

A preponderance of evidence establishes the Beneficiary's possession of a bachelor's degree as required for the offered position and the requested immigrant visa classification. The Petitioner,

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[DOL]'s Market Information Pilot Program." 8 C.F.R. § 204.5(l)(3)(i). DOL, however, hasn't implemented the pilot program described in the regulation. That portion of the regulation therefore doesn't apply.

however, hasn't demonstrated the Beneficiary's possession of a degree in the field of study required for the offered position, or the minimum qualifying experience for the job. The record also doesn't demonstrate the Petitioner's ability to pay the proffered wage or the validity of the accompanying labor certification.

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