U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23475199

Date: DEC. 1, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, a wholesale trade company, seeks to employ the Beneficiary as a product data analyst. 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 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 concluding that the Beneficiary's experience with the petitioning employer cannot meet the experience requirement for the job offered. More specifically, the Director determined that the Petitioner had provided incorrect information on the labor certification relating to the Beneficiary's experience in the position offered.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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. LAW

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the employment of a noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *Id*.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

On Part H of ETA Form 9089, the Petitioner indicated that the position of product data analyst requires a bachelor's degree in "operations research or [a] related field" and 12 months of experience in the position offered. Experience in an alternate occupation is not acceptable.

Question J.21 on ETA Form 9089 asked: "Did the [Beneficiary] gain any of the qualifying experience with the [petitioning] employer in a position substantially comparable to the job opportunity requested?" The Beneficiary answered "NA" (not applicable), rather than "Yes" or "No."

On section K of ETA Form 9089, the Beneficiary indicated that he had worked in the proffered position, product data analyst, with the Petitioner from April 2018 onward. The Beneficiary did not list any other job experience.

The Director asked the Petitioner to submit evidence to show that the Beneficiary met the minimum experience requirement for the position at the time the Petitioner filed ETA Form 9089 in December 2019. In response, the Petitioner submitted tax and payroll documentation to establish the Beneficiary's past employment with the company. The Petitioner stated:

> [O]ur company . . . . allowed [the Beneficiary] to use his experience . . . [at] our company from April 3, 2018 to Dec. 26, 2019. The reason is that it was infeasible for our company to train an [*sic*] US worker to qualify for the position.
>
> We fully explained to the Department of Labor through the audit response to the DOL about the infeasibility to train an US worker. . . .
>
> . . . .
>
> If we employ an US worker who does not have any experience for the position of Product Data Analyst, he will be spending at least about three months to six months to learn by himself or herself the computerized logistics system which [the Beneficiary] established.

The Director denied the petition, stating: "the work experience that the beneficiary gained with [the petitioning] organization in the position of Product Data Analyst cannot be used to satisfy the experience requirement on the labor certification."

On appeal, the Petitioner asserts that the "NA" answer to question J.21 on the ETA Form 9089 should not negate DOL's asserted acceptance of the Beneficiary's past experience in the position offered.

Typically, a Beneficiary cannot rely on experience gained while working for the petitioning employer in the position offered. *See* 20 C.F.R. § 656.17(i)(3). The employer must establish that the beneficiary possessed the minimum required experience at the time of hiring. The Director appears to have relied upon this regulation in denying the petition, although the Director did not cite the regulation. The Petitioner contends that it qualifies for an exception to this rule, if 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(i)(3)(ii). The

Petitioner asserts that it established to DOL's satisfaction, via its "audit response," that the job offer in this proceeding qualifies for this exception.[1]

The record as it now stands does not contain documentation from DOL to support the Petitioner's claims regarding the nature of DOL's audit of the ETA Form 9089 related to experience with the employer. Therefore, we will remand the matter so that the Director can specifically request this evidence and afford the Petitioner an opportunity to corroborate its assertions. The burden is on the Petitioner to meet all eligibility requirements.

III. CONCLUSION

The record must be developed in order to substantiate the Petitioner's assertions about the nature and inquiry of the audit of ETA Form 9089 to determine whether the Beneficiary's experience can be considered, and if consequently, he meets the experience requirement of the labor certification in conformity with 8 C.F.R. § 204.5(l)(3)(ii)(A).

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

[1] The Petitioner has not denied that the Beneficiary's experience is "substantially comparable" to the proffered position. *See* 20 C.F.R. § 656.17(i)(5)(ii).