U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22623364

Date: OCT. 03, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, an IT consulting business, seeks to employ the Beneficiary as a database administrator. It requests classification of the Beneficiary under the third-preference, immigrant classification for professional workers. 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" category 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 labor certification does not support the classification of advanced degree professional.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will remand the matter to the Director for further consideration and entry of a new decision.

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). *See* 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 foreign national 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). *See* 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. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

The job offer portion of the labor certification underlying a petition for a professional "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i). In addition, the beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In this case, the labor certification states that the minimum educational requirement is a U.S. master's degree or a foreign equivalent degree in computer science or mechanical engineering (Parts H.4, H.4-B, H.7, H.7-A, and H.9) and that the minimum experience requirement is 12 months of experience in the job offered or as a programmer analyst (Parts H.6, H.6-A, H.10, H.10-A, and H.10-B). Part H.8 does not permit an alternate combination of education and experience. Part H.14 of the labor certification ("Specific skills or other requirements") states, in part: "Will accept any equally suitable combination of education, training, and/or experience which would qualify an applicant to perform the duties of the job offered."[1]

The Director concluded that the record did not establish that the labor certification supports the classification of advanced degree professional. Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1). However, the instant petition does not request classification as an advanced degree professional. Rather, the Petitioner here requests classification under the third-preference immigrant classification for professional pursuant to Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii).[2] As the Director erred in applying the incorrect classification to the petition, we will withdraw the decision.

We note that the Petitioner previously filed two petitions on behalf of the Beneficiary, supported by the same underlying labor certification. Both petitions were filed requesting classification as an advanced degree professional.[3]

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[1] The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

> If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

[2] The third-preference, immigrant classification for professional workers allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status. *Id.*

[3] Those petition's receipt numbers are [redacted] and [redacted] The Director denied the first petition, concluding that the underlying labor certification does not support the advanced degree professional classification. He determined that language at Part H.14 indicates that the Petitioner would accept "experience alone, or experience in conjunction with education of less than a baccalaureate degree level, as the equivalent of an advanced degree." The Petitioner appealed and we withdrew the Director's decision, concluding that the minimum educational requirement is unchanged by the language in Part H.14 of the labor certification. We remanded the matter for further consideration of the Beneficiary's qualifications for the offered position. The Petitioner later withdrew the first petition in response to the Director's request for additional evidence. The Director denied the second petition on the same grounds. The Petitioner did not appeal that decision.

In its third filing, the matter now before us on appeal, the Director issued a decision identical to the denial of the second petition, despite the Petitioner's request for a different classification. Because of this deficiency, the Director's decision is withdrawn. However, we will remand the matter to the Director for further consideration of the Beneficiary's qualifications for the offered position as noted below.

The labor certification's experience requirement for the offered job of database administrator is 12 months of experience in the job offered or as a programmer analyst. Part H.14 also states, in part, that the required experience "must include 12 months using Teradata and Informatica." The duties of the offered job include:

> Coordinate changes to computer databases, test and implement the database applying knowledge of database management systems; plan, coordinate and implement security measures to safeguard computer databases; perform complex tasks; report directly to a project lead or manager; and use Teradata and Informatica.

The Beneficiary's claimed experience on the labor certification states that he worked for the Petitioner as a programmer analyst from August 20, 2015, to the date the labor certification was filed. The regulation requires that evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1).

The Petitioner submitted a letter dated January 24, 2017, in support of the petition. The letter confirmed the Beneficiary's employment with the Petitioner as a programmer analyst from August 20, 2015, to the date of the letter. The letter also stated his duties as follows:

> Develop, modify and maintain programs; gather and review user requirements; analyze, design, implement and install software; write and test programs and applications; maintain and enhance existing system; prepare logical and physical data models; extract, load and transform data in the data mart; design and develop ETL mappings; develop complex mappings in Informatica; use ETL processes to load data from various source systems; design and develop Teradata BTEQ scripts; code Teradata SQL, Teradata stored procedures, macros and triggers; develop UNIX shell scripts; migrate Informatica objects from 9.1 to 9.5; perform Informatica upgrade testing; and use Informatica, Teradata, Oracle, PL/SQL, XML, UNIX shell scripts, SSRS, Visual Studio, SVN, Tidal, Visio, ER/Studio, TOAD, Erwin and Control-M.

The Petitioner cannot rely on experience that the Beneficiary gained with it, unless the experience was in a job substantially different than the offered position or the employer demonstrates the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). A job is substantially different from an offered position if it requires performance of the same job duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii). On the labor certification, in response to question J.21, which asks whether

the Beneficiary gained any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested, the Petitioner answered "no." In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable and the terms of the labor certification provide that applicants can qualify through an alternate occupation.

Here, in this matter, both positions - database administrator and programmer analyst - appear to be responsible for the performance of the Petitioner's database using Teradata and Informatica. As a result, the Beneficiary's experience gained with the Petitioner appears to have been substantially comparable to the offered job, as he appears to have been performing the same job duties 50 percent or more of the time. According to DOL regulations, therefore, the Petitioner cannot rely on this experience for the Beneficiary to qualify for the proffered position. The record contains no other evidence of the Beneficiary's prior employment experience. A petitioner must establish that it meets each eligibility requirement by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. 369, 375-76 (AAO 2010).

Based on the deficiencies described above, we cannot affirmatively find that the Beneficiary possessed the minimum experience required by the labor certification as of the priority date.

With the instant petition, the Petitioner again submits only the January 24, 2017 letter describing the Beneficiary's experience with it as a programmer analyst since 2015. This letter is insufficient to establish that the Beneficiary possesses the minimum experience required by the labor certification because it appears that the Beneficiary gained experience with the Petitioner in a position that is substantially comparable to the offered job. However, the Director did not raise this issue in his decision. Therefore, we will remand the matter for further consideration under the proper requested classification. On remand, the Director should request additional evidence of the Beneficiary's qualifications and allow the Petitioner reasonable time to respond.

IV. CONCLUSION

The Director did not examine the evidence of record to determine whether the labor certification supports the requested classification of professional worker. We will therefore withdraw the Director's decision on this issue. As the Director's decision did not address whether the Beneficiary possessed the experience required by the labor certification as of the priority date, we will remand the matter to the Director for further consideration.

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