U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24122165

Date: MAR. 14, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Professional)

The Petitioner seeks to employ the Beneficiary as a marketing specialist under the third-preference, immigrant classification for professional workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based category allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding the Petitioner did not satisfy their burden to demonstrate that the Beneficiary is qualified for the offered position. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we conclude that a remand is warranted in this case.

I. LAW

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 foreign national 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 ETA Form 9089, Application for Permanent Employment Certification (labor certification) with an immigrant visa petition to USCIS. *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a certified position and a requested immigrant visa category; here, at least two years of training or experience, which is required under 8 C.F.R. § 204.5(l)(3)(ii)(A) when the Petitioner indicated on the labor certification that in addition to a bachelor's degree it also required experience to qualify for the position. Demonstrating eligibility requires a beneficiary to possess all the education, training, and experience specified on the labor certification as of a petition's priority date. *Christo's, Inc.*, 26 I&N Dec. at 539 (citing *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160

(Reg'l Comm'r 1977)). Under 8 C.F.R. § 204.5(d), a petition's priority date is the date the DOL accepts the request for labor certification for processing.

Finally, if USCIS approves a petition, a designated 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. ANALYSIS

After the initial filing, the Director issued a request for evidence (RFE), in part noting that discrepant information emerged between the experience listed on the labor certification the Petitioner submitted when compared to a Form DS-160, Nonimmigrant Visa Application (NIV) the Beneficiary filed with the U.S. Department of State in December 2016. The discrepancies related to whether she was self-employed as a marketing analyst versus working for a particular company (Employer 1). The Director also noted the employment dates during that same timeframe did not align when comparing the NIV and the labor certification. The Director requested that the Petitioner resolve the issue with independent and objective documentary evidence. The Petitioner responded to the RFE and provided letters and other evidence regarding who owned Employer 1 and restated the dates the Beneficiary worked for that company, but they did not address the variance in the dates she purportedly worked for Employer 1.

After considering the RFE response, the Director concluded inconsistent information relating to the Beneficiary's prior work credentials called into question whether the Petitioner showed the Beneficiary gained the requisite experience to qualify for this classification and for the offered position under the terms of the labor certification. The Director decided that the Petitioner did not meet its burden to establish the Beneficiary was fully qualified for this benefit as of the petition's priority date (March 10, 2021) by a preponderance of the evidence.

Were we to presume the information on the labor certification was accurate, we would note the Beneficiary accumulated her qualifying experience working for two employers, and each position individually appears to meet the type and amount of experience the Petitioner required. According to the labor certification at Section K, she worked for Employer 1 from October 1, 2012, through October 1, 2016, as a marketing manager. She then worked for a second company (Employer 2) from October 1, 2016, through at least March 10, 2021 (the date the Petitioner filed the labor certification).[1] Therefore, the experience she gained through her work with Employer 2 could presumably qualify her for the 48 months of experience the Petitioner required.

A. Labor Certification Requirements

The requirements for the offered position of marketing specialist are indicated in Section H of the labor certification (Job Opportunity Information). The pertinent requirements read as follows:

4.	Education: Minimum level required:	Bachelor's
4-B.	Major field of study.	Marketing

[1] For each employer, the labor certification reflects the Beneficiary worked 40 hours per week.

5.	Is training required for the job?	No
6.	Is experience in the job offered required?	Yes
6-A.	Number of months experience required.	48 months
7.	Is an alternate field of study acceptable?	Yes
7-A.	Specify the major field of study.	Business Management
8.	Is an alternate combination of education and experience acceptable?	No
9.	Is a foreign educational equivalent acceptable?	Yes
10.	Is experience in an alternate occupation acceptable?	Yes
10-A.	Number of months experience in alternate occupation required.	48
10-B.	Job title of the acceptable alternate occupation.	Marketing or Marketing Related Field

Based on the Petitioner's own requirements, in addition to a bachelor's degree in marketing (or business management as an alternative field of study), or its foreign equivalent, it also required 48 months of experience in marketing or a marketing related field.

B. Beneficiary's Qualifications

First, we address the issue within the Director's decision regarding Employer 1, and then we raise an additional issue they did not discuss in their denial. We agree with the Director that the Petitioner did not adequately address the differences in the dates the Beneficiary worked for Employer 1. To revisit, the Petitioner provided materials addressing who the Beneficiary worked for during the relevant period, but they did not attempt to answer why conflicting information existed between the dates she worked for Employer 1 on the labor certification when compared to her employment listed on the NIV. We consider this a relevant issue as the Petitioner presented this employment and the dates she worked for Employer 1 on the labor certification when it required her work experience during the past three years prior to 2021.

On appeal, the Petitioner now acknowledges the discrepant information when comparing the NIV and the labor certification relating to Employer 1 and they indicate it is best explained as a drafting error. Because we are remanding the matter to the Director for other reasons, they can evaluate that explanation. We do, however, note that the period of experience in question relating to Employer 1 was not required to satisfy the regulatory requirements because other experience listed on the labor certification also qualified the Beneficiary for the offered position, but the Director did not discuss that aspect. So as the Director evaluates the Beneficiary's qualifications on remand, they may wish to consider the relevance of this discrepancy, and in particular, whether when combined with the additional discordant claims discussed below, it might adversely affect the Petitioner's remaining eligibility claims.

Next, we observe discrepant information relating to the Beneficiary's experience she accrued under Employer 2 that the Director did not raise in their decision. When the Beneficiary filed the NIV in December 2016, she indicated she was self-employed. But that does not correspond with the information within the labor certification and the experience letter from Employer 2. Those sources

reflect she was working for Employer 2 since at least October 2016. She had therefore allegedly been working for Employer 2 for at least two months when she filed the NIV claiming differently. Additional information within the Beneficiary's NIV also appears to be different from the experience letter she provided covering this same employment period. For example, the location where she purportedly worked. The Director may wish to seek clarity on this issue when we remand the matter.

In summary, while the discordant information the Director raised in their denial decision was relevant, it was not necessarily determinative of the issue of qualifying experience in this instance.[2] However, when additional inconsistencies arise within other qualifying experience, this can create a pattern with the potential to adversely affect a party's credibility. As the entirety of the Beneficiary's qualifying experience is now in question, we consider this an appropriate situation to apply the findings of *Matter of Ho*, 19 I&N Dec. 582, 591–92 (BIA 1988) in which the Petitioner should ameliorate the discrepant information within the record, and it may be necessary to do so through more than simple statements or sworn affidavits. Instead—at the Director's discretion—such an amelioration may be required through the submission of relevant, independent, and objective documentary evidence that reveals which facts are the truth. *Id.*

Due to the additional issues that emerged within our appellate review, we are remanding the matter to the Director to evaluate whether the Beneficiary is qualified to occupy the offered position on an additional basis that was not part of their denial decision.

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

[2] A more appropriate inquiry would have evaluated the discrepant information and compared it with the other qualifying experience claims to render a totality of the circumstances approach. Had the Director performed such an analysis, they might have discovered the inconsistencies relating to Employer 2 for a more wholistic analysis. Here, we are not implying that an officer cannot deny a case for a filing party's failure to satisfy their burden of proof relating to ancillary qualifying experience. Instead, that officer should show they considered all of the claims and should determine the impact of the inconsistent information on the entirety of the party's eligibility statements.