U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 01917234

DATE: AUG. 26, 2022

Certification of Texas Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, a software services company, seeks to employ the Beneficiary as a software developer, applications. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground the Petitioner did not establish that the proffered position was a *bona fide* job opportunity available to U.S. workers. The Director based this decision on a finding that the specific educational degree required by the terms of the labor certification – a master's degree in computer applications or a foreign educational equivalent – is in a field of study for which master's degrees are not available in the United States. While finding that the Beneficiary meets the educational requirement of the labor certification by virtue of his master's degree in computer applications from an Indian university, the Director stated that the Petitioner's failure to establish that the proffered position was available to U.S. workers presented a novel issue. Therefore, the Director certified his decision to our office for review pursuant to 8 C.F.R. § 103.4(a)(1), which provides that decisions by field office or service center directors may be certified to the AAO "when the case involves an unusually complex or novel issue of law or fact."[1]

Upon *de novo* review, we will remand the case to the Director for further consideration and the issuance of a new decision.

[1] In the notice of certification, the Director advised the Petitioner that it could submit a brief or other written statement to the AAO for our consideration in reviewing the Director's decision. However, no brief or written statement of any kind has been received from the Petitioner.

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). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). 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 U.S. 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. 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 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

The issue before us is whether the requirements listed on the labor certification restricted U.S. workers from being able to qualify for the offered position. To address this issue, it is important to first look at the requirements in this matter, and to review the respective roles of DOL and USCIS in the employment-based immigrant visa process.

The labor certification accompanying the instant petition was filed with the DOL on August 31, 2016, and certified by the DOL on November 4, 2016. As delineated in section H (items 4-14) of the labor certification, the job requirements for the position of "software developer, applications" are a master's degree in computer applications or a foreign educational equivalent, and working knowledge of Microsoft SQL Server Solutions for BI Environments, including SQL Server, Integration Services (SSIS), and Reporting Services (SSRS). No experience is required to qualify for the job. The labor certification further specifies that no alternate field of study or alternate combination of education and experience is an acceptable alternative to the primary educational requirement of a U.S. master's or foreign equivalent degree in computer applications and knowledge of the software tools specifically identified. [2]

The record shows that the Beneficiary earned a Master of Computer Applications from [redacted] University in [redacted] India, during the years 2001-2004, which followed a three-year bachelor of science degree from [redacted] University. The master's degree from [redacted] University is comparable to a master's degree level of education from a university in the United States. The record also shows that the Beneficiary gained experience with the software tools required in the labor certification with a prior employer, [redacted] in India. Finally, the record indicates that the Beneficiary began working for the Petitioner as a programmer analyst in November 2012.

The Director issued a request for evidence (RFE) in which the Petitioner was advised that master of computer application degrees only appeared to be offered by Indian universities, not by U.S.

[2] We note that, following the denial and certification of this petition, the Petitioner obtained another labor certification from the DOL for the position of software developer, applications, and filed a second petition with the new underlying labor certification. That petition was approved on June 21, 2019. The second labor certification lists the minimum requirements for the offered position as a master's degree, or foreign educational equivalent, in computer engineering, computer science, or computer applications.

universities, which raised the question of whether the proffered position was a *bona fide* job offer available to U.S. workers.[3] The Director requested that the Petitioner submit specific documentation to establish the *bona fides* of its job offer. In response to the RFE the Petitioner submitted copies of its recruitment materials, including its internal job posting notice, its job order posted with the Hawaii State Workforce Agency, and newspaper advertisements, all of which stated that the educational requirement for the job was a master's degree or foreign equivalent in computer applications. The Petitioner stated that no job applications were received from its recruitment activities. The Petitioner also submitted computer printouts from various U.S. colleges and universities that they stated offered degrees in the field of computer applications. However, the computer printouts did not establish that any of the U.S. colleges or universities offered a master's level degree in computer applications.

The Director concluded that while the Beneficiary's master's degree in computer applications from an Indian university met the educational requirement of the labor certification, the Petitioner failed to establish that the proffered position was available to U.S. workers because the requisite educational degree was not available in the United States.

The Director reviewed this documentation in his decision and determined that it did not show that any of those U.S. institutions offered a master's degree in computer applications.

A. The Roles of the DOL and USCIS in the Immigrant Visa Process

Section 212(a)(5)(A)(i) of the Act provides that:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The authority to make decisions on preference classification petitions, however, rests with USCIS. As stated by a federal circuit court:

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[3] The job opportunity requirements listed in the Form 9089 "must represent the employer's actual minimum requirements for the job opportunity." 20 C.F.R. § 656.17(i)(1). The purpose of these regulations "is to address the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker." *Your Employment Service Inc.*, 2009-PER-00151 (BALCA Oct. 30, 2009) (internal citations omitted). "The intent behind [the regulations] was to prevent employers from unlawfully tailoring their job descriptions to the alien worker's qualifications." *Matter of CK-12 Foundation*, 2016-PER-00246 (BALCA Apr. 30, 2020).

> There is no doubt that the authority to make preference classification decisions rests with INS.[4] The language of section 204 [Procedure for Granting Immigrant Status] cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[5] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See also K.R.K. Irvine, Inc. v. Landon,* 699 F.2d 1006 (9th Cir. 1983); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305 (9th Cir. 1984).

Thus, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

B. Position Requirements

According to DOL regulations at 20 C.F.R. § 656.17(h)(1) **Job Duties and Requirements,** "The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation . . . ." The regulations at 20 C.F.R. § 656.17(i) state that DOL will evaluate the employer's actual minimum requirements in accordance with the following criteria:

> (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
>
> (2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.
>
> (3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire . . . .

Section 204(b) of the Act, provides, in pertinent part, as follows:

> After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 203(b)(2) or 203(b)(3), the [Secretary of Homeland Security] shall, if he determines that the facts stated in the

[4] Immigration and Naturalization Service, the predecessor organization to USCIS.
[5] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

petition are true and that the alien . . . is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

Since the minimum requirements as phrased appear to exclude U.S. workers, the proper course of action based on the facts of this matter is to consult with DOL. On remand, the Director should consult with the DOL regarding concerns about the effect of the minimum requirements on U.S. workers.

The Director raised valid concerns about the *bona fide* nature of the offered position and whether it was truly open to U.S. workers because of the minimum requirements. The regulation at 20 C.F.R. § 656.10(c) states that: "The employer must certify to the conditions of employment listed below on the [labor certification]." The regulation lists ten conditions, the eighth of which reads: "The job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). In accord with this regulatory requirement the Petitioner certified at section N.8 of the instant labor certification for the job of software developer, applications that: "The job opportunity has been and is clearly open to any U.S. worker."

As previously noted, the labor certification is quite specific with regard to the educational requirement for the proffered position. It requires a master's degree in computer applications or a foreign educational equivalent and does not allow for any alternate field of study or level of degree. The record shows that the Beneficiary earned a Master of Computer Applications from [redacted] University in India, which meets the educational requirement of the labor certification. However, the evidence of record does not show that any such degree is offered by U.S. institutions of higher education and available to U.S. workers.

The computer printouts submitted by the Petitioner in response to the RFE showed that a Bachelor of Science in Information Technology – Software Application Programming is offered by Colorado Technical University (Colorado Springs, Colorado), a Bachelor of Applied Science with a major in Computer Application Development is offered by Metropolitan State University (St. Paul, Minnesota), a two-year associate level degree in computer applications is offered by Montgomery College (Maryland), an Associate of Science in Computer Applications is offered by American Military University (online), and an Associate of Science in Computer Applications/Business Technology is offered by Cabrillo College (Aptos, California). All of these programs are at the bachelor's or associate degree level. None of them are master's degree programs.

The Petitioner submitted one final printout from Boston University which appeared to show that it offered a master's degree program in computer applications. Upon accessing the university's website, however, the Director discovered that that no degree programs in computer applications – at the master's level or otherwise – were offered by Boston University. We have accessed the university's website once again and confirm that Boston University does not offer degree programs (at any level) in computer applications. *See* http:/www.bu.edu/academics/degree-programs (accessed August 23, 2022).

The Petitioner has not furnished any additional evidence to supplement the materials submitted in response to the RFE. Thus, the Petitioner has not shown that a master's degree in computer applications is offered by any college or university in the United States. Since a master's degree in computer applications is the only degree that could meet the labor certification's educational

requirement, and no such degree is offered in the United States as far as the record shows, it appears that U.S. workers who might have been interested in the proffered position would have been discouraged from applying and extremely disadvantaged in competition with applicants from India, where such a degree is offered, and from any other foreign country offering such a degree. In effect, U.S. workers would have had to earn the requisite degree abroad to qualify for the job offered. It is noteworthy in this regard that the Petitioner claims that it did not receive any applications for the proffered position in response to its job posting notices and advertisements.

Accordingly, the Director should consult with DOL regarding whether such certified provisions would restrict the availability of the position from U.S. workers.

C. Employment Location

Though not addressed by the Director, we note that the Petitioner provided conflicting information on the labor certification and the I-140 petition about the location of the job opportunity. While the labor certification indicated that the primary worksite would be in [redacted] Hawaii, the I-140 petition stated that the work would be performed at the Petitioner's main address in [redacted] Texas. A labor certification for a specific job offer is valid only for the particular job opportunity, the foreign individual for whom the certification was granted, and for the *area of intended employment* stated on the [labor certification application]. 20 C.F.R. § 656.30(c)(2). (Emphasis added.) It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The position was advertised as located in [redacted] Hawaii. On remand, the Director may wish to request evidence related to this issue, and allow the Petitioner an opportunity to submit evidence to demonstrate that the position is available in the stated work location to demonstrate the validity of the work location in the labor certification.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration.

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