U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21764270

Date: AUG. 2, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a software engineer. The company requests her 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, concluding that the Petitioner did not establish the Beneficiary possesses the minimum experience requirements of the offered position. On appeal, the Petitioner asserts that that newly submitted evidence satisfies the Petitioner's burden.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 169, 175 (AAO 2010). Upon *de novo* review, we will dismiss the appeal.

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 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 petition 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 for 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).

III. ANALYSIS

The Petitioner has filed two separate Form I-140 petitions on behalf of the Beneficiary based on the same labor certification. The Petitioner timely filed an immigrant petition with the labor certification seeking to employ the Beneficiary as a software engineer, and that immigrant petition was approved in July 2015. The instant amended petition was filed on October 29, 2020 based on the same underlying labor certification. (The reason for the amendment is that the Petitioner is seeking to change the classification under which their petition was filed.)

The accompanying labor certification, Form ETA 9089, Application for Permanent Employment Certification (ETA 9089), states the minimum educational requirements of the offered position as a U.S. bachelor's degree, or a foreign equivalent degree, in computer science or a related field of study such as engineering, math, business administration, or related field. Furthermore, the certification provides that 60 months of experience in the job offered are required. Thus, the Petitioner's ETA 9089 requires the minimum of a bachelor's degree in computer science and 60 months of experience to perform the job duties of the position. The petition's priority date is April 11, 2014, 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, she had attained the degree and experience required. The Petitioner submitted sufficient evidence to establish the Beneficiary possesses the minimum educational requirement found in the accompanying ETA 9089. However, the Petitioner submitted insufficient evidence to establish the Beneficiary possessed 60 months of experience prior to the petition's priority date.

In a request for additional evidence (RFE), the Director asked the Petitioner to provide evidence that the Beneficiary's qualifications met those in the accompanying ETA 9089. In response, the Petitioner provided letters verifying the Beneficiary's employment for only three years, one month, and 10 days, which fell short of the requisite 60 months (or five years). As such, the Director's denial specified that the evidence of record was insufficient to establish the 60 months of work experience and that the Beneficiary qualified for the position as noted in Section H of the Petitioner's ETA 9089.

On appeal, the Petitioner submits new evidence that it argues establishes its burden to establish the Beneficiary's qualifications. The new evidence includes a statement from the Beneficiary, and a letter dated May 2005 on company letterhead attesting to the Beneficiary's employment. Elsewhere in the

record, there is an affidavit dated November 20, 2014 from an individual purporting to have been the Beneficiary's supervisor during her time at that company. We note that the writer of the May 2005 letter on company letterhead and the November 2014 affidavit appear to be the same person, with only a slight variation of their names, which we discuss further below.

When we consider whether the Beneficiary possesses the minimum experience required for the offered position, we look to the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), which provides:

> *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). Therefore, the Petitioner must establish, by a preponderance of the evidence that the Beneficiary possessed 60 months of experience as a software engineer, "analyst, programmer, consultant, lead, architect, developer or manager" as of the April 11, 2014 priority date.

The record demonstrates that the Beneficiary claims employment with four employers: the Petitioner, [redacted]" [redacted]' and [redacted] (We write the names of these companies as they appear in the ETA 9089.) In response to the Director's RFE, the Petitioner submitted sufficient evidence to establish the Beneficiary's prior employment with [redacted], [redacted] [redacted] and the Petitioner. However, the Petitioner did not submit evidence to support the Beneficiary's experience with [redacted]

In adjudicating immigration benefit requests, USCIS regularly reviews affidavits, testimonials, and letters from both laypersons and recognized experts. To be probative, a document must generally provide: (1) the nature of the affiant's relationship, if any, to the affected party; (2) the basis of the affiant's knowledge; and (3) a specific - rather than merely conclusory - statement of the asserted facts based on the affiant's personal knowledge. *Matter of Chin*, 14 I&N Dec. 150, 152 (BIA 1972); *see also* 8 C.F.R. § 103.2(b)(2)(i) (requiring affidavits in lieu of unavailable required evidence from "persons who are not parties to the petition who have direct personal knowledge of the event and circumstances"); *Matter of Kwan*, 14 I&N Dec. 175, 176-77 (BIA 1972); *Iyamba v. INS*, 244 F.3d 606, 608 (8th Cir. 2001); *Dabaase v. INS*, 627 F.2d 117, 119 (8th Cir. 1980). A petitioner may submit a letter or affidavit that contains hearsay or biased information, but such factors will affect the weight to be accorded the evidence in an administrative proceeding. *See Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The ETA 9089 specifies that the Beneficiary worked at [redacted] a software consulting business, from May 1, 2002 to May 1, 2005 as a full time (working 40 hours a week)

"systems analyst." In the affidavit submitted with this appeal, the Beneficiary attests to the above, and lists four duties she claims she undertook while at [redacted] She also writes that she "made every effort to contact [redacted] to obtain a detailed employment verification letter to no avail." In the May 2005 letter submitted on appeal, the writer purports to be the HR Manager of [redacted] and signs the letter as [redacted] The letter does not mention her duties, although the dates of her employment and job title match those on the ETA 9089. A notarized affidavit, found elsewhere in the record, signed by [redacted] on November 20, 2014, states that he was her supervisor, and carried the title "Project Manager" at [redacted] It likewise affirms her dates of employment from May 1, 2002 to May 1, 2005 and her title of systems analyst. We note that this affidavit lists five job duties including "[p]rovided US specific data feed requirements for both strategic and tactical calculator." While the other four duties listed match those listed in the Beneficiary's statement, this particular job duty is not included.

The totality of the evidence is insufficient to establish the Petitioner's burden of proving the Beneficiary possessed 60 months of experience, prior to the petition's priority date, because the evidence contains discrepancies that cannot be reconciled by other evidence in the record. First, while the documents signed by [redacted] and [redacted] appear to have originated from the same person, their contents are not consistent. For example, in one letter the author states that the Beneficiary held different job titles during the time he worked with the Beneficiary. In one document he claims he was her supervisor and worked as a "Project Manager." In the other, he writes that he is verifying her employment as "HR Manager" for the company. In the document listing her duties, an additional duty is included that is not mentioned in the Beneficiary's statement. It does appear on the ETA 9089, however. These discrepancies undermine the probative value of the evidence presented.

Moreover, the Petitioner did not supplement the record with contemporaneous evidence of her employment such as pay stubs or other records to establish the Beneficiary's work at [redacted] In her statement, the Beneficiary claims she made "every effort" to contact her prior employer but that it was to "no avail." This statement is vague, lacks detail, and does not explain the steps she took to contact her employer, who she contacted, and by what means. In short, her statement coupled with the other discrepancies noted above, is not sufficient to resolve the credibility issues identified above.

The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, at 591-92. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* The Petitioner has not provided an updated letter from this company, nor does it assert that a new letter is unavailable for any reason. Rather, the Petitioner, in lieu of the regulatory prescribed evidence, submits statements from individuals claiming to have knowledge of the Beneficiary's employment and experience. However, as described, these statements are discrepant and vague.

IV. CONCLUSION

For the reasons stated above, the Petitioner has not established with independent, objective evidence that the Beneficiary possesses the required 60 months of experience in the offered position, as required

by the labor certification. The basis for the Director's denial has not been overcome. Therefore, the appeal is dismissed.

ORDER: The appeal is dismissed.