



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 18425482

Date: AUG. 2, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a retail store, seeks to employ the Beneficiary as an assistant manager under the third-preference, immigrant visa category for “other workers.” *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based “EB-3” immigrant classification allows a U.S. employer to sponsor for lawful permanent residence a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary’s possession of the minimum employment experience required for the offered position.

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. 369, 375 (AAO 2010). Upon *de novo* review, we will withdraw the decision of the Director. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an “other,” or unskilled, worker generally follows a three-step process. First, a prospective employer must apply to 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 noncitizen 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. ANALYSIS

A petitioner must establish a beneficiary’s possession of all DOL-certified, job requirements of 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).¹ When evaluating 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 the authority for setting the *content* of the labor certification”) (emphasis in original).

The accompanying labor certification states the minimum requirements of the offered position of manager as one year of experience “in the job offered.” Experience “in the job offered” on a labor certification means “experience performing the key duties of the job opportunity” listed on the labor certification. *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. at 4 (BALCA Oct. 24, 2011). The duties of the position described in the labor certification are as follows:

Assist manager to coordinate the business activities. Assist management with budgeting, accounting and purchasing. Maintains inventory by checking merchandise to determine inventory levels anticipating customer demand. Monitor sales activities to ensure that the customers receive satisfactory service and quality goods.

The labor certification states that the position requires neither training, experience, special skills, nor other requirements. The certification also indicates that the Petitioner will not accept experience in an alternate occupation.

In support of claimed qualifying experience, a petitioner must submit a letter from a beneficiary’s former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must state the employer’s name, title, and address, and “a description of . . . the experience of the [beneficiary].” *Id.* If such a letter is unavailable, USCIS will consider other evidence of a beneficiary’s experience. 8 C.F.R. § 204.5(g)(1).

On the labor certification, the Beneficiary attested that, by the petition’s priority date, he gained about four years and nine months of full-time, qualifying work experience. He stated that while serving in the Bangladesh military he was employed as an assistant manager from June 2013 to March 2018. Section K.9 of the labor certification, which requests details about the work experience, such as “duties performed, use of tools, machines, skills, qualifications. . . .” and information about his employer, such as the employer’s phone number and the name of his supervisor, simply contains the statement “see attached.” However, the Petitioner did not provide the referenced attachment to the labor certification.

In the initial filing with the petition, the Petitioner provided employment letters to document the Beneficiary’s work experience. The Director initially issued a request for evidence (RFE) seeking

¹ This petition’s priority date is March 29, 2018, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition’s priority date).

additional evidence of the Petitioner's ability to pay the proffered wage. Later, after reviewing the Petitioner's response to the RFE, he denied the petition concluding that the Petitioner did not establish that it could pay the proffered wage.

The Petitioner filed a motion to reopen the petition with the Director. The Director granted the motion, withdrew the denial of the petition, then issued a notice of intent to deny (NOID) the petition, indicating that the record contained inconsistent and insufficient evidence of the Beneficiary's qualifications for the position. Specifically, the Director indicated in the NOID that the submitted employment letters reflected the Beneficiary's employment with the Bangladesh military in various capacities and did not sufficiently document his asserted work experience. The Director further discussed the information that the Beneficiary provided to the United States Department of State (DOS) in his nonimmigrant visa application in which he described his employment with the Bangladesh military as follows:

Presently I am serving as a GSO-2 (Coordination) of Director, Administration Bureau, HQ DFGI. I work as a confidential staff officer of Director and coordinate administrative matters with the HQ DGFI and other bureaus in Bangladesh.

The Petitioner provided evidence in response to the Director's NOID. The Director reviewed the evidence, including evidence provided in response to the NOID, then denied the petition a second time, concluding that the record did not sufficiently document that the Beneficiary's possessed at least one year of work experience in the position offered. Specifically, the Director rejected the submitted work experience letters and other evidence provided in support of the petition, concluding that the evidence did not persuasively demonstrate that the Beneficiary's asserted duties as a "coordinating officer," "visa officer/protocol officer," and "assistant manager" of a military canteen store were sufficiently analogous to the civilian assistant manager position offered in the Petitioner's retail store to qualify as work experience in the position offered. The Director further determined that the evidence did not provide sufficient, consistent detail about the actual duties that the Beneficiary performed while in the Bangladesh military.

On appeal, the Petitioner submits relevant evidence addressing the Beneficiary's work experience credentials, to include a sworn statement from the Beneficiary, letters from Bangladesh military officers, and an employment certificate issued by the Bangladesh military. Thus, we will withdraw the Director's decision and remand the matter back to the Director to consider this evidence in the first instance and determine whether the Petitioner has demonstrated that the Beneficiary qualifies for the third-preference "other worker" visa category, and whether he meets the specific requirements of the labor certification (one year of work experience in the offered position).

On remand, the Director may wish to issue a new NOID outlining aspects of the evidence in the record that he deems deficient and allowing the Petitioner an opportunity to respond. The Director should consider the entire record, including any new evidence submitted and, if deficient, must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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