U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 5717087

Date: AUG. 10, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a provider of telecommunications and other services, seeks to permanently employ the Beneficiary as director of quality assurance engineering. The company requests his classification under the employment-based, third-preference (EB-3) immigrant visa category as a professional. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). Prospective U.S. employers may sponsor noncitizens for permanent residence in this category to work in jobs requiring at least bachelor's degrees. *Id.*

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner demonstrated neither the Beneficiary's possession of the minimum employment experience required for the offered position nor the job's availability to U.S. workers. The Director also found that the Beneficiary willfully misrepresented his experience.

On appeal, the Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of the evidence. *See Matter Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the record does not support the petition's denial based on the job's purported lack of availability to U.S. workers or the Beneficiary's alleged misrepresentation. But determination of his qualifying experience for the position requires additional evidence, and the Petitioner did not demonstrate its required ability to pay the position's proffered wage. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and a noncitizen's employment in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C.

§ 1154(a)(1)(F); 8 C.F.R. § 204.5(l)(3)(i). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(C).

Finally, if USCIS approves a petition, a beneficiary 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 REQUIRED EXPERIENCE

A petitioner must demonstrate that a beneficiary met 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] In 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 unstated 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 Petitioner's labor certification states the minimum requirements of the offered position of director of quality assurance engineering as a bachelor of science degree in engineering and three years of experience in the "Job Offered." Experience in a job offered means experience performing "the major job duties of the job offered" as listed on a labor certification. *Matter of Maple Derby, Inc.*, 1989-INA-185, *3 (BALCA May 15, 1991) (*en banc*). The Petitioner indicated on the labor certification that it will not accept experience in a related occupation.

On the labor certification, the Beneficiary claimed almost 40 years of full-time, qualifying experience. He stated that, from November 2000 until the filing of the labor certification application in March 2005, he worked for [redacted], a U.S. business development corporation. He indicated [redacted] employment of him as: a director, from November 2000 to December 2001; director of textile technology engineering operations, from December 2001 to August 2003; and vice president for engineering, from August 2003 to March 2005.

The Beneficiary also stated that, from 1964 to 2000, he worked for two textile companies in Ecuador. He stated that [redacted] employed him as general manager from August 1964 to July 1966. He also indicated that, from July 1966 to November 2000, [redacted] employed him as president.

[1] This petition's priority date is March 21, 2005, the date an office in DOL's employment service system 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). The application's filing predates the March 28, 2005 effective date of DOL's current labor certification regulations and case law interpreting the regulations. *See* Final Rule for Permanent Labor Certification Applications, 69 Fed. Reg. 77326, 77326 (Dec. 27, 2004). We will therefore cite DOL regulations and case law existing at the time of the application's filing. Decisions of DOL's Board of Alien Labor Certification Appeals (BALCA) do not bind USCIS. *See* 8 C.F.R. § 103.10(b) (requiring Department of Homeland Security employees to follow precedent cases of the Board of Immigration Appeals (BIA) and U.S. Attorney General in proceedings involving the same issues). But USCIS may find BALCA decisions persuasive or defer to BALCA's interpretation of DOL labor certification regulations. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) (holding that an administrative agency should defer to the reasonable, regulatory interpretations of a sister agency authorized by Congress to promulgate the rules).

To support claimed qualifying experience, a petitioner must submit letters from a beneficiary's former or current employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must contain the employers' names, addresses, and titles, as well as descriptions of the beneficiary's experience. *Id.* "If such evidence is unavailable, other documentation relating to the alien's experience . . . will be considered." 8 C.F.R. § 204.5(g)(1).

A. The Beneficiary's U.S. Experience

The Petitioner submitted letters from a former manager of [redacted] the U.S. corporation that the Beneficiary says employed him from 2000 to 2005. Consistent with his attestations on the labor certification, the letters state the corporation's full-time employment of him as: a director, from November 2000 to December 2001; director of textile technology engineering operations, from December 2001 to August 2003; and vice president of engineering, from August 2003 to March 2005.

[redacted] letters, however, do not demonstrate that the Beneficiary gained the requisite experience in the job offered in two of his three claimed positions at the company. As listed on the labor certification, the offered position's major duties include: "[f]ormulat[ing] and establish[ing] organizational policies and operating procedures for engineering system organizations;" "[d]evelop[ing], implement[ing], and coordinat[ing a] product assurance program to prevent or eliminate defects in new or existing engineering products;" and "[a]nalyz[ing], evaluat[ing], and present[ing] information concerning factors, such as business situations, production capabilities, manufacturing problems, economic trends, and design and development of new engineering products." A 2007 letter from [redacted] former manager states that, as a director from November 2000 to December 2001, the Beneficiary "monitored the investments and operations of the company's textile industries, import and export and related financing, [and] determined operational procedures and goals." On appeal, the Petitioner contends that the duties listed in the letter "have a sufficient nexus" to those of the offered position listed on the labor certification. But a nexus is not enough. As previously indicated, the Petitioner must demonstrate the Beneficiary's performance of "the major job duties of the job offered" as listed on the labor certification. *Matter of Maple Derby, Inc.*, 1989-INA-185, at *3. Contrary to the major duties of the offered position, the letter does not state the Beneficiary's development, implementation, and coordination of a product assurance program for engineering products, or his analysis, evaluation, or presentation of information regarding the design and development of new engineering products. Also, the record lacks evidence demonstrating how monitoring investments and the operations of importing, exporting, and financing match the offered position's duties. The letter therefore does not demonstrate that the Beneficiary gained the required qualifying experience in the job offered as a [redacted] director.

The record also does not establish the Beneficiary's acquisition of qualifying experience as [redacted] vice president for engineering. Again, the offered position's major duties include: "[f]ormulat[ing] and establish[ing] organizational policies and operating procedures for engineering system organizations;" "[d]evelop[ing], implement[ing], and coordinat[ing] product assurance program to prevent or eliminate defects in new or existing engineering products;" and "[a]nalyz[ing], evaluat[ing], and present[ing] information concerning factors, such as business situations, production capabilities, manufacturing problems, economic trends, and design and development of new engineering products." A 2011 letter from [redacted] former manager states that, as the company's vice president for engineering from August 2003 to March 2005, the Beneficiary "formulated policies and directed the operations of the *real estate interest* of the company." (emphasis added). The letter also states that he

"managed and supervised staff engaged in preparing lease agreements, recording rental receipts, and performing other activities necessary to the efficient management of the corporation's real estate holdings." We recognize that, like the offered position's job duties, the letter indicates the Beneficiary's formulation of policies and direction of operations. But, contrary to the offered position's job duties, the letter describes the policies and operations as involving real estate rather than "engineering system organizations" as stated on the labor certification. Also, contrary to the offered position's job duties listed on the labor certification, the letter does not indicate the Beneficiary's development, implementation, and coordination of a product assurance program for engineering products or his analysis, evaluation, or presentation of information regarding the design and development of new engineering products. Further, the letter indicates that the Beneficiary performed duties other than those of the offered position, such as managing and supervising staff in real estate-related activities. The letter therefore does not demonstrate that the Beneficiary gained qualifying experience in the job offered as [redacted] vice president for engineering.

Contrary to the Director, however, we find sufficient evidence that the Beneficiary gained qualifying experience in the job offered as [redacted] director of textile technology engineering operations from December 2001 to August 2003. In a 2007 letter, the company's former manager stated that, in this role, the Beneficiary:

> established the quality control system of all import and export of raw material and finished textile products, designed and implemented the engineering development programs to maximize productivity strategies; formulated and maintained the engineering operational procedures and goals and designed coordination schedules, production needs, and product assurance for engineering specifications.

Consistent with the major duties of the offered position, the listed tasks indicate that the Beneficiary: formulated and established organizational policies and procedures; developed and implemented an engineering product assurance program; and designed and developed new engineering products.

The Director found the letter unreliable, determining that it conflicts with other information. The letter states the Beneficiary's establishment of a quality control system, implementation of engineering development programs, maintenance of procedures and goals, and design of schedules, needs, and product assurance regarding a textile business. But other records indicate that, from December 2001 to December 2004, [redacted] did not import or export any textile materials or products.

We find that, in a 2011 affidavit, [redacted] former manager sufficiently resolved this apparent inconsistency. He confirmed the Beneficiary's performance of the duties described in the prior letter. But he said that, in 2003, the company determined that "economic conditions did not warrant initiating full scale textile production in the United States." Thus, while the Beneficiary established the engineering systems, programs, and procedures for a textile business, [redacted] never engaged in the business. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record).

While we credit the Beneficiary's qualifying experience as [redacted] director of textile technology engineering operations, the record indicates his employment in that job for only about 20 months, from

December 2001 to August 2003. His work in the role therefore does not meet the requisite three years of qualifying experience required by the offered position.

On appeal, the Petitioner contends that the Beneficiary also gained qualifying experience from August 2003 to March 2005, while directing [redacted] real estate operations as vice president for engineering. The Petitioner notes that the affidavit of [redacted] former manager states: "The company uses [the Beneficiary's] knowledge of applied industrial engineering as part of the company's total property management strategy (i.e., the company needs a person who can understand how to make the business run more efficiently and how to run the physical properties themselves)."

But, as the labor certification states, the offered position's major duties include developing a product assurance program for "engineering products" and evaluating the design and development of "new engineering products." In contrast, the letter of [redacted] former manager states that, as vice president for engineering, the Beneficiary's activities involved *real estate*, not "engineering products." The record therefore does not demonstrate that, as [redacted] vice president for engineering, he performed the offered job's major duties and gained the requisite experience. *See Rosedale & Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (holding that, when determining a noncitizen's qualifications for an offered position, the immigration service "must examine the certified job offer exactly as it is completed by the prospective employer").

The Petitioner also contends that USCIS' conclusions erroneously conflict with the expert opinions in two independent evaluations it submitted. One of the evaluations, however, does not specifically address the Beneficiary's claimed qualifying experience. Rather, the evaluation, from a U.S. university professor of industrial and systems engineering, finds the Beneficiary's combination of education and experience equivalent to a U.S. bachelor's degree in industrial engineering. Thus, this evaluation does not specifically relate to the Beneficiary's experience for the offered position.

The other evaluation, from a U.S. professor of business administration, asserts the Beneficiary's qualifying experience for the offered position and relates his prior job duties to those of the offered job. But the evaluation does not recognize the offered position's requirement for experience in the "Job Offered." On the labor certification, the company could have indicated its acceptance of three years of experience in a "Related Occupation," or in a "Related Occupation" or the "Job Offered." Instead, the Petitioner limited its acceptance to only experience in the "Job Offered." Thus, as previously indicated, the company must demonstrate the Beneficiary's performance of "the major job duties of the job offered" as listed on the certification. *Matter of Maple Derby*, 1989-INA-185 at *3. The evaluation's assertions that the Beneficiary's duties in his prior job relate to those of the offered position are therefore insufficient. *See Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (holding that the immigration service may reject or afford lesser evidentiary weight to expert testimony that conflicts with other evidence or "is in any way questionable").

For the foregoing reasons, we conclude that the Petitioner has not demonstrated the Beneficiary's acquisition of the requisite qualifying experience in the job offered during [redacted] employment of him in the United States.

B. The Beneficiary's Experience in Ecuador

The Petitioner did not submit a letter from the Ecuadoran textile company that purportedly employed the Beneficiary from 1964 to 1966. But the record contains a 2007 letter from the other Ecuadoran textile company, [redacted] where he claims to have served as president from July 1966 to November 2000. Consistent with 8 C.F.R. § 204.5(l)(3)(ii)(A), the letter from [redacted] purported former general manager describes the Beneficiary's job duties as president during that period.

The Director, however, questioned the letter's validity. Citing online information, the Director found that, in 2003, [redacted] "was liquidated." The employment verification letter for the Beneficiary on the company's stationery states the document's issuance in 2007, almost four years later. The Director therefore questioned the letter's authenticity, concluding that the record did not demonstrate [redacted] issuance of the document during the business's existence.

The record, however, contains court documents indicating the Ecuadoran government's seizure of [redacted] in 2008. The documentation, filed in a U.S. court under penalty of perjury, indicates [redacted] existence and operations at the time of the seizure. The record therefore indicates the company's existence and operations at the time of the employment letter's issuance in 2007. Also, the record does not establish the reliability of the Director's online information about [redacted] purported 2003 "liquidation." The Director described the information as "open source" material. But the Director did not provide an Internet address or printout of the information, depriving the Petitioner of an opportunity to review, explain, or rebut the adverse material. The online information does not cast enough doubt on the Beneficiary's claimed qualifying experience at [redacted] to support the petition's denial.[2]

In questioning the Beneficiary's claimed qualifying experience at [redacted] the Director also cited "an undated and unsigned personal statement accompanying the beneficiary's curriculum [vitae]." The Beneficiary purportedly stated his job duties at [redacted] in the statement, which was submitted with a 2003 nonimmigrant visa petition for him. The Director found the job-duty descriptions to be "broad" and to "not necessarily reflect the duties [that the Beneficiary] listed on the labor certification."

The statement, however, is unreliable. As the Director noted, it is neither dated nor signed. Thus, the statement and its contents warrant little evidentiary weight. The document is too unreliable to constitute an inconsistency in the Beneficiary's claimed qualifying experience at [redacted]

Court records submitted by the Petitioner provide the strongest support for the Director's doubts about the Beneficiary's claimed qualifying experience at [redacted] from 1966 to 2000. The records suggest that, for nearly half the Beneficiary's claimed presidency at [redacted] an Ecuadoran bank - [redacted] - simultaneously employed him. Responding in 2009 to a Florida court complaint by an Ecuadoran government agency against him and his brother, the Beneficiary admitted serving as the bank's executive vice president from the mid-1980s to December 1998.[3] Thus, the Director found

[2] The Petitioner submits additional evidence on appeal indicating that [redacted] remained operating until 2008.

[3] The complaint sought a judgment against the Beneficiary and his brother, the bank's executive president, of at least $200 million. On August 3, 2022, a Florida appeals court affirmed a summary judgment in the brothers' favor, finding that they do not owe Ecuador the claimed amount. *See* Fla. Third Distr. Ct. of Apps., "Search Opinions," https://www.3dca.flcourts.org/Opinions/.

that the Beneficiary's apparent simultaneous employment by the two companies undermined his claimed qualifying experience at [redacted]

As previously indicated, a petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N at 591. The record as currently constituted, however, does not sufficiently demonstrate an inconsistency in the Beneficiary's apparent simultaneous employment by [redacted] We agree with the Director that, from the mid-1980s to December 1998, the Beneficiary could not likely have worked for both companies at the same time on full-time bases. Further, we agree that, if he simultaneously worked full-time for both companies during that period, the inconsistency would cast doubt on his entire claimed tenure with [redacted] *Id.* ("Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.") But the record does not indicate the number of hours the Beneficiary worked as [redacted] executive vice president.

Because the Beneficiary's qualifications for the offered position appear to turn on his full- or part-time employment status at [redacted] we will remand the matter for further evidence. On remand, the Director should ask the Petitioner for a letter from the bank regarding its purported employment of the Beneficiary and the number of hours he worked. The Director should also provide the Petitioner with a reasonable opportunity to respond. If a letter from the bank is unavailable, the Petitioner must demonstrate the document's unavailability before USCIS may consider alternate evidence of the claimed qualifying experience. *See* 8 C.F.R. § 204.5(g)(1).

III. AVAILABILITY OF THE OFFERED POSITION

Based on evidence of purported family relationships between the Beneficiary and the Petitioner's owners and directors, the Director found insufficient evidence of the offered position's availability to U.S. workers. *See* 20 C.F.R. § 656.20(c)(8) (2004) (requiring a labor certification employer to certify that "[t]he job opportunity has been and is clearly open to any U.S. worker"). We will withdraw this portion of the Director's decision.

IV. THE ALLEGED MISREPRESENTATION

The Director found that the Beneficiary willfully misrepresented his qualifying experience as [redacted] director of textile technology engineering operations on the labor certification application. We will also withdraw this finding.

V. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record does not establish the Petitioner's ability to pay the offered position's proffered wage. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent resident status. 8 C.F.R. § 204.5(g)(2). Because the Petitioner states its employment of less than 100 people, evidence of its ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of a petition's priority date. If a petitioner did not annually pay a proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to fund any differences between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[4]

The labor certification states the proffered wage of the offered position of director of quality assurance engineering as $89,000 a year. As previously noted, the petition's priority date is March 21, 2005.

The record lacks evidence that the Petitioner ever employed the Beneficiary. Thus, based solely on wages paid, the company has not demonstrated its ability to pay the proffered wage.

The Petitioner submitted copies of its parent company's federal income tax returns. The returns contain the Petitioner's financial information for 2005, 2006, 2007, and 2009. But the record lacks required evidence of the company's ability to pay in 2008 and from 2010 through 2022. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence").

Also, the Petitioner's financial evidence does not establish its ability to pay in 2005, 2006, 2007, or 2009. While omitting the company's annual net income for 2005 and net current assets for 2007, the tax returns show the Petitioner's generation of negative amounts of net current assets in 2005 and net income in 2007. The records also show that, in 2006 and 2009, the company generated negative amounts of both net income and net current assets.

Further, USCIS records indicate that, after this petition's priority date, the Petitioner filed another immigrant petition for a different beneficiary.[5] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this and its other petition, from this petition's priority date until the other petition's beneficiary obtained lawful permanent residence. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, at the time of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). The record, however, lacks the proffered wage and priority date of the Petitioner's other petition, preventing USCIS from determining the combined amount of proffered wages the company must demonstrate its ability to pay.

For the foregoing reasons, the Petitioner has not demonstrated its ability to pay the proffered wage. On remand, the Director should notify the company of this evidentiary deficiency and afford the business a reasonable opportunity to respond with evidence, argument, or both.

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[4] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Z-Noorani, Inc. v. Richardson*, 950 F. Supp. 2d 1330, 1345-46 (N.D. Ga. 2013).

[5] USCIS records identify the Petitioner's additional petition by the receipt number [redacted]

If supported by the record, the Director may notify the Petitioner of any other potential denial grounds beyond those regarding the Beneficiary's qualifying experience and the company's ability to pay the proffered wage. The Director, however, must provide the Petitioner with a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

VI. CONCLUSION

The record does not support the petition's denial based on the job opportunity's purported lack of availability to U.S. workers or the Beneficiary's alleged misrepresentation of his qualifying experience. But determination of his qualifying experience for the offered position requires additional evidence, and the Petitioner has not demonstrated its continuing ability to pay the position's proffered wage.

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