U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24443248

Date: JAN. 31, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a vice president. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary met the minimum requirements of the labor certification and is qualified for the offered position. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (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 will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id*.

If DOL approves a position, an employer must next submit the certified labor application 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally 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 Petitioner requests classification of the Beneficiary as a skilled worker.[1] The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states that to qualify for skilled worker classification:

> … the petition must be accompanied by evidence that the [beneficiary] meets the educational, training or experience, and any other requirements of the individual labor certification … The minimum requirements for this classification are at least two years of training or experience.

In order to determine what a job opportunity requires, we must examine "the language of the labor certification job requirements." *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the labor certification form. *Id.* at 834. Moreover, we read the labor certification as a whole to determine its requirements. "The [labor certification] is a legal document and as such the document must be considered in its entirety." *Matter of Symbioun Techs., Inc.*, 2010-PER-10422, 2011 WL 5126284 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the labor certification clarified an employer's minimum job requirements).

To be eligible for skilled worker classification, therefore, the Beneficiary must meet all specific requirements of the labor certification and have at least two years of relevant experience (or training). All requirements must be met by the petition's priority date, which in this case is November 9, 2017. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

In this case, section H of the labor certification (Job Opportunity Information) specifies the following with respect to the requirements for the job of vice president:

H.4	Education: minimum level	Bachelor's
H.4-B	Major field of study	Computer Science, Information Systems or related
H.5	Training required?	No
H.6	Experience in the job offered required?	No
H.7	Alternate field of study acceptable?	Yes
H.7-A	Specify the major field of study:	related

[1] The Petitioner has filed three Form I-140 immigrant petitions on behalf of the Beneficiary (in August 2018, September 2018, and March 2020) based on the same underlying labor certification. The Director denied the first petition, requesting classification of the Beneficiary as an advanced degree professional, and the Petitioner did not appeal. The Director denied the second and third petitions, concluding that the Petitioner had not established that the Beneficiary met the minimum requirements for the offered position as stated on the labor certification. The Petitioner appealed the denial of the second petition and we dismissed the appeal in May 2021. The Petitioner has appealed the denial of the third petition and this matter is now before us.

H.8	Alternate combination of education and experience acceptable?	No
H.9	Foreign educational equivalent acceptable?	Yes
H.10	Experience in an alternate occupation acceptable?	Yes
H.10-A	Number of months experience required	120
H.10-B	Job title of alternate occupation	*
H.14	*H4 or Equivalent[2] *10-B – experience delivering technology solutions; 5 year experience as a technical manager; 3 year principles and processes. Must be well-versed in all aspects of Information and Data Management. *Any suitable combination of relevant work experience & education may be substituted.	

Section J of the labor certification states that the Beneficiary's highest level of education relevant to the job offered is "other," specified as a "diploma and experience evaluated as [bachelor's degree] in comp info systems, Microsoft Certified Systems Engineering," earned in 1999 at the [redacted] of Business and Technology, in Canada. As evidence of this credential the record includes copies of a certificate of completion of a Microsoft Certified Systems Engineer Diploma Programme, issued by [redacted] of Business and Technology on May 13, 1999; and an official transcript of marks listing a period of study of January 19, 1998 to January 15, 1999, and showing successful completion of the Microsoft Certified Systems Engineer Programme Diploma.

Section J of the labor certification also lists the following employment experience for the Beneficiary:

- With the Petitioner, in the offered position, from February 2, 2017;[3]
- 31 months with [redacted] as Director of Enterprise Information, from July 2, 2014 to February 1, 2017;
- Four months with [redacted], as BI Solutions Architect, from March 1, 2014 to July 1, 2014;
- 45 months with [redacted] Corporation, as IT Manager – Business Intelligence, from June 1, 2010 to February 28, 2014;
- 24 months with [redacted] Corporation, as Senior Database Administrator, from June 1, 2008 to June 1, 2010.
- 62 months with the Department of [redacted] (Canadian Government), as Senior Systems Analyst, from April 1, 2003 to May 31, 2008; and
- 33 months with [redacted] Technologies Inc., as Senior Network Engineer, from November 1, 1999 to July 31, 2002.

[2] Section H.14 includes additional skill requirements, but the additional information does not relate to any equivalency.
[3] The Petitioner cannot rely on experience that the Beneficiary gained with it in a substantially comparable position. 20 C.F.R. § 656.17(i)(3).

The Director issued a notice of intent to deny (NOID) the petition, informing the Petitioner that it did not establish that the Beneficiary met the minimum requirements of the labor certification. The Director noted that "the labor certification requires a bachelor's degree plus 120 [months] of experience" and the submitted evidence was insufficient because a U.S. baccalaureate degree is generally found to require four years of education. *See Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977).

After reviewing the Petitioner's response to the NOID, the Director denied the petition, concluding that the Petitioner did not establish that the Beneficiary met the minimum requirements for the offered position as stated on the labor certification.

On appeal, the Petitioner asserts that the Director misinterpreted the terms of the labor certification, and that the Director disregarded the evaluations of the Beneficiary's credentials which found his diploma and work experience to be equivalent to a U.S. bachelor's degree.

A. The Minimum Requirements of the Labor Certification

The labor certification states that the offered position requires a U.S. bachelor's, or foreign equivalent, degree, and 120 months of experience delivering technology solutions, including five years as a technical manager, and three years principles and processes. No alternate combination of education and experience is accepted according to H.8.

On appeal, the Petitioner's counsel asserts that the minimum education requirement is further defined in section H.14 where it stated "H4 or equivalent," and that, in accepting a foreign educational equivalent in H.9, "the only natural reading of the degree requirement question is 'Bachelor's or Equivalent' where 'Equivalent' refers to anything other than a foreign degree, such as training and experience."

However, as the Director notes[4] the accompanying labor certification states that no alternate combination of education and experience is acceptable to qualify for the offered position. If H.4 and H.8 are read together, both parts require a bachelor's degree, or foreign equivalent degree, based on education alone. The Petitioner could have indicated on the labor certification in section H.8 that a combination of education and experience was acceptable, but it did not. The Petitioner does not address its response to H.8 or explain how the labor certification can be read excluding the response to H.8. While the Petitioner essentially asserts ambiguity in how the terms are read, the Petitioner defines in H.14 what constitutes an "equivalent" to a bachelor's degree.

Additionally, we note that the record does not include recruitment materials to support counsel's claimed intention to accept foreign degrees based on training or experience, or to demonstrate that the minimum requirements were accurately described to potentially qualified U.S. workers.[5] Unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The Petitioner has not demonstrated by a preponderance of the evidence its claimed intent to accept less than a U.S.

[4] We also noted this deficiency in our May 2021 decision related to a prior I-140 filing relying on the same labor certification.

[5] We specifically noted the lack of this evidence in our prior decision.

bachelor's or foreign equivalent degree to meet the minimum educational requirement for the proffered position.

Thus, based on the plain language of the labor certification, the offered position requires a bachelor's or foreign equivalent degree based on academic study, and 120 months of experience. *See, e.g., Estrada-Hernandez v. Holder,* 108 F. Supp. 3d 936, 947 (S.D. Cal. 2015) (holding that we reasonably interpret a job's requirements based on the plain language of a labor certification) (citations omitted).

B. The Beneficiary's Qualifications

The Petitioner asserts that the Beneficiary's combination of a one-year diploma and approximately 250 months of work experience are the equivalent of a U.S. bachelor's degree. The record includes three academic equivalency evaluations in attempt to demonstrate the Beneficiary's claimed qualifications. The Petitioner asserts that the Director dismissed the "multiple evaluations establishing that [the Beneficiary] is qualified for the position, as well as the fact that the Beneficiary has actually been performing the position for years [as] evidence that the Beneficiary is qualified to hold the proffered position."

However, the issue before us is not whether the Beneficiary is qualified to perform the job duties of the offered position, but rather whether he meets the minimum requirements *of the individual labor certification* as required by 8 C.F.R. § 204.5(l)(3)(ii)(B).

In looking at the evaluations, the first evaluation is from The Trustforte Corporation, prepared in 2013. The evaluation asserts that the Beneficiary's diploma is equivalent to one year of academic study, and that this diploma, combined with approximately 17 years (between 1995 and 2013) of progressively responsible work experience and training in computer information systems and related areas, is equivalent to a four-year bachelor of science degree in computer information systems from an accredited U.S. college or university. The evaluation relies on the following work experience:

- With [redacted] Corporation, from June 2008 to present;[6]
- With the Department of [redacted] from April 2003 to May 2008;
- With [redacted] Technologies Inc. from November 1999 to July 2002; and
- With [redacted] Inc. from August 1995 to November 1999.

A second evaluation from The Trustforte Corporation was prepared in 2020. This evaluation considers only the Beneficiary's experience, and does not address the one-year diploma. The evaluation asserts that the Beneficiary's 16 years and 10 months of progressively responsible work experience is equivalent to a four-year bachelor of science degree in management information systems and related areas from an accredited U.S. college or university. The evaluation relies on the following work experience:

[6] The evaluation is dated April 4, 2013.

- With [redacted] from July 2014 to present;[7]
- With [redacted] from March 2014 to July 2014;
- With [redacted] Corporation, from June 2008 to February 2014; and
- With the Department of [redacted] from April 2003 to May 2008.

A third evaluation was prepared by Pace University in 2019. This evaluation asserts that the Beneficiary's diploma is equivalent to one year of academic study toward a bachelor of science degree at an accredited institution of higher education in the United States, and that this, combined with approximately 10 years and nine months of progressively responsible bachelor's-level employment experience in the field of computer information systems, is equivalent to a four-year bachelor of science degree in computer information systems from an accredited U.S. college or university. The evaluation relies on the following work experience:

- With [redacted] Corporation, from June 2008 to February 2014; and
- With the Department of [redacted] Trade from April 2003 to May 2008.

The record includes a statement from the Beneficiary dated November 7, 2018, stating that he has "over 19 years of required experience for the job offered." He describes his experience as follows:

- With [redacted] as Director of Enterprise Information Management, from March 2016 to February 2017;
- With [redacted] as BI Solutions Architect, from March 3, 2014 to July 1, 2014;
- With [redacted] Corporation, as IT Manager in Business Intelligence, from June 2010 to February 2014;
- With [redacted] Corporation, as Senior Database Administrator, from June 2008 to June 2010.
- With the Department of [redacted] as Senior Systems Analyst, from April 2003 to May 2008; and
- With [redacted] Technologies as Senior Network Engineer, from November 1999 to July 2002.

The record also includes multiple letters attesting to the Beneficiary's experience, as follows:

- With [redacted] from July 2014 to February 2017;
- With [redacted] Group from April 7, 2014 to July 3, 2014;
- With [redacted] Corporation, from June 16, 2008 to February 10, 2014; and
- With the Department of [redacted] from April 25, 2003 to May 2008.

[7] The evaluation is dated February 27, 2020. This overlaps with the Beneficiary's claimed employment with the Petitioner in the offered position as of February 2, 2017, as stated in Part J of the labor certification.

In our prior decision based on an earlier filing we discussed each of the evaluations and noted several inconsistencies in the record regarding the Beneficiary's claimed work experience. The labor certification, the Beneficiary's statement, and the experience letter provide the Beneficiary's end date with [redacted] as February 2017; however, the Pace University evaluation states that he was continuing his employment through February 2020. The Beneficiary lists his start date with [redacted] as March 2016; however, the labor certification and the supporting experience letter list the Beneficiary's start date as July 2014, which is close to a two-year discrepancy. The labor certification, the Beneficiary's statement, and the evaluations list the Beneficiary's start date with [redacted] Group as March 1, 2014; however, the supporting experience letter states that his employment began April 7, 2014. As the calculation of the Beneficiary's total experience relies upon the accuracy of these dates, the information is critical to the Beneficiary's eligibility for the offered position. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The record does not include supporting documentation of the Beneficiary's claimed experience from 1995 to 2002.[8] The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides that "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." The record does not include letters from the Beneficiary's claimed employers during this time period.

Evaluations of academic credentials by evaluation services or individual experts are utilized by USCIS as advisory opinions. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept it or may give it less weight. *See Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). Based on the inconsistencies discussed above, we cannot conclude that the evaluations establish that the Beneficiary's diploma and work experience result in a foreign equivalent degree to a U.S. bachelor's degree. Rather, the record demonstrates that the Beneficiary has one year of academic study and approximately 166 months of experience.

Each evaluation reaches the general conclusion that the combination of the Beneficiary's diploma and work experience are equivalent to a U.S. bachelor's degree. However, each evaluation uses a different total amount of experience to reach this conclusion – 17 years, 16 years and 10 months, and 10 years and nine months. None of the evaluations in the record specifically details how much of the Beneficiary's work experience must be considered in combination with his one-year diploma to reach the equivalent of a U.S. bachelor's degree. Based on the terms of the labor certification, the offered position requires 120 months of experience *in addition* to a bachelor's or foreign equivalent degree. Even if the labor certification allowed for a combination of education and experience, the record does not demonstrate that the Beneficiary has *both* a bachelor's degree equivalent *and* 120 months of experience.

Therefore, the Petitioner has not established that the Beneficiary meets the minimum requirements for the offered position as stated on the labor certification and the appeal will be dismissed.

[8] We specifically noted this deficiency in our May 2021 decision. The Petitioner did not submit new evidence of the Beneficiary's experience during this period.

III. THE ABILITY TO PAY THE PROFFERED WAGE

Also raised by the Director in the NOID, but not addressed in the Director's decision, the record does not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). If a petitioner employs less than 100 people, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of vice president as $200,000 annually. As previously noted, the petition's priority date is November 9, 2017. The record includes the 2016 and 2018 Form 1120S, U.S Income Tax Return for an S Corporation, for [redacted] Inc., which includes the Petitioner's tax identification number in its list of subsidiaries.

The Director raised this issue in the NOID. We also raised this issue in our May 2021 decision and stated that, with any future filings in this matter, the Petitioner must submit copies of its annual reports, federal tax returns, or audited financial statements from 2017, the year of the petition's priority date, through the present. However, the record continues to lack evidence of the Petitioner's ability to pay the proffered wage in 2017, the year of the priority date. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Without evidence in the year of the priority date, a determination cannot be reached regarding the Petitioner's ability to pay the proffered wage.

IV. CONCLUSION

The Petitioner has not established that the Beneficiary meets the minimum requirements as set forth on the accompanying labor certification. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.