U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27518850

Date: JUN. 21, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an e-commerce business specializing in musical instruments and supplies, seeks to employ the Beneficiary as an IT project manager. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. See Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Beneficiary is qualified for the offered position because she does not meet the experience requirements stated on the labor certification. 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. LAW

Section 203(b)(3)(A)(ii) of the Act grants preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. *See also* 8 C.F.R. § 204.5(i)(2) (defining "professional"). Profession is defined as one of the occupations listed in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. *Id.*

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 would not harm wages and working conditions of U.S. workers with similar jobs. *See* 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). *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and the requested immigrant visa category. 8 C.F.R. § 204.5(k)(3)(i)(B). 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(a)(1) of the Act, 8 U.S.C. § 1255(a)(1).

II. ANALYSIS

The Director determined that the Beneficiary meets the educational requirements for the offered position and the requested immigrant classification. However, the Director concluded that Petitioner did not establish, as required, that the Beneficiary satisfies the minimum experience requirements for the offered position of IT project manager as specified on the DOL-certified permanent labor certification.

A petitioner must demonstrate 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] 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 unstated requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority of setting the *content* of the labor certification") (emphasis added).

The Petitioner's labor certification states the primary job requirements for the offered position of IT project manager as a U.S. master's degree or a foreign equivalent degree in computer science or a "related field," plus two years of experience "in the job offered." The Petitioner indicated "No" at section H.10 of the labor certification, where asked to indicate whether experience in an alternate occupation is acceptable in lieu of experience in the job offered.

With respect to the Beneficiary's qualifications, the Petitioner indicated at section J.18 of the labor certification that she has the experience required for the job opportunity (i.e, two years of experience in the job offered). It stated at section J.21 that she did not gain any of the qualifying experience with the Petitioner in a position substantially comparable to the proffered position. The record reflects that the Beneficiary, prior to assuming the proffered position of IT project manager in June 2017, worked for the Petitioner as an "intern" for two years, from June 2015 to June 2017.[2]

If a beneficiary is already employed by the petitioning employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the beneficiary at the time of hiring by the employer. The employer cannot require domestic worker applicants to possess training and/or experience beyond what the beneficiary possessed at the time of hire. Therefore, experience gained while working for the petitioning employer

[1] This petition's priority date is August 26, 2021, the date DOL accepted the Petitioner's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] The Beneficiary's only other work experience was a one-year, part-time research associate position which the Petitioner does not claim as qualifying experience in the job offered.

cannot be used to satisfy the minimum job requirements on the labor certification unless that experience was gained in a position not "substantially comparable" to the proffered position, or the employer can demonstrate that it is no longer feasible to train a worker to qualify for the position. 20 C.F.R. § 656.17(i)(3). A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

As noted, the Director determined that the Beneficiary meets the stated educational requirement for the offered position. The record supports this determination based on the Petitioner's submission of an official academic record demonstrating the Beneficiary's completion of a U.S. master's degree in computer science. *See* 8 C.F.R. § 204.5(i)(3)(ii)(C).

The Director also determined that the Beneficiary's two years of prior employment as an intern with the petitioning company was not in a substantially comparable position.[3] The Petitioner provided position descriptions for the "intern" and "IT project manager" positions with the percentage of time spent on the various duties. We agree with the Director's conclusion that the Beneficiary, during her two-year tenure as an intern, was not required to spend more than 50 percent of her time performing the same duties as the IT project manager position.

The Director concluded, however, that the Petitioner did not demonstrate that the Beneficiary has two years of experience "in the job offered," which is the minimum experience requirement stated on the labor certification. The Director emphasized that the Petitioner did not provide evidence that the Beneficiary has two years of experience as an IT project manager and emphasized that it did not indicate on the labor certification that experience in an alternate occupation is acceptable to meet the 24-month experience requirement. The Director noted that the Beneficiary's prior position as an intern was not substantially comparable to the position of IT project manager and therefore determined that her experience in that position cannot be deemed experience in the job offered.

For the reasons discussed below, we agree that the Petitioner has not met its burden to establish that the Beneficiary meets the experience requirement stated on the labor certification.

In general, if a Petitioner's answer to section J.21 of the labor certification is "no," then the experience with the employer may be used by the beneficiary to qualify for the proffered position, but only if: (1) the prior position was not substantially comparable to the offer position, and (2) the terms of the labor certification at section H.10 provide that applicants can qualify through an alternate occupation. Here, the Petitioner did not indicate that an alternate occupation is acceptable. Rather, it claims that the Beneficiary gained two years of experience "in the job offered" based on her employment in a position that is not substantially comparable to the job offered. Experience "in the job offered" means experience performing an offered position's key duties as stated on a labor certification. *E.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *3 (BALCA Oct. 24, 2011) (citations omitted).

On appeal, the Petitioner asserts that "DOL has already reviewed the underlying labor certification and certified it" and that by doing so "acknowledged that the beneficiary fulfills the requirements of the proffered position." The Petitioner notes that there are numerous examples cases in which DOL

[3] Although the Petitioner used the job title "intern" on the labor certification, it also refers to the position as "intern/junior business systems analyst" in the submitted documentation.

denied a labor certification based on a finding that the beneficiary did not meet the experience requirements. It provides a copy of a BALCA decision affirming one such denial. The Petitioner also maintains that "previous Forms I-140 containing qualifying experience in the role of 'Intern' have been approved by the Texas Service Center" and asserts that such prior petitions are "evidence that the instant Labor Certification and Petition were properly filed as per USCIS policy."

The Petitioner's assertion that USCIS should defer to the DOL's certification of the labor certification as evidence that the Beneficiary meets the minimum requirements for the position is not persuasive. By approving a labor certification, the 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 domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act.

The regulation at 20 C.F.R. § 656.17(i) indicates that DOL should evaluate an employer's actual minimum requirements for a given position and review the training and experience possessed by a beneficiary at the time of hiring by the employer as part of its authority over the labor certification process. Nevertheless, USCIS maintains the authority to determine whether the beneficiary and the offered position meet the requirements of the requested employment-based preference category and whether the beneficiary meets the minimum requirements of the offered position based on the terms of the labor certification. *See, e.g., Madany v. Smith*, 696 F.2d at 1012 (noting that all matters relating to preference classification eligibility not expressly delegated to DOL remain with the authority of the former Immigration and Naturalization Service).

The Petitioner's assertion that USCIS has approved other petitions based on similar facts is also unpersuasive. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000). Therefore, the Petitioner's unsupported general claim that other beneficiaries of other petitions have been able to rely on experience gained as an "intern" to meet the stated job requirements on their individual labor certifications is not persuasive.

The Petitioner also objects to the Directors specific conclusions. The Petitioner contends that a position that is not substantially comparable to the offered position may still be within the same occupation. The Petitioner further notes that "intern" is not typically used as an occupational title and that it therefore would not have been appropriate or correct to enter "intern" as an alternate occupational title at section H.10 of the labor certification.[4] It further maintains that the Beneficiary's intern position encompassed all of the duties of the IT project manager, even if it required the Beneficiary to perform those duties less than 50% of the time. The Petitioner cites *Matter of Bel Air Country Club*, 1988-INA-233 (BALCA Dec. 23, 1988) in support of its claim that it is appropriate for an employer to limit the minimum work experience requirement to experience "in the job offered" in

[4] As noted, the Petitioner has indicated that the Beneficiary's formal job title during her tenure as an intern was "junior business analyst." It does not address why it would have been inappropriate or incorrect to indicate "junior business systems analyst" as an alternate occupation on the labor certification.

cases where only job applicants who have performed the same or similar duties would be able to perform the duties of the offered job with minimal training.

The Petitioner maintains that the duties of the positions are the controlling factors and asserts that, while the intern and IT project manager positions are not "substantially comparable" the record reflects that the Beneficiary gained the experience with the job duties of the proffered position while employed as an intern.

The Petitioner's claim is not persuasive. Although the labor certification indicates that the Beneficiary spent a portion of her time performing the duties of the position offered during her tenure as an intern/junior business systems analyst, the Petitioner's initial letter emphasized that all her duties as an intern were performed under direct supervision. The Petitioner also stated that "[h]er position as an Intern . . . was not substantially comparable to the proffered position of IT Project Manager," and that the two positions are "substantially different" in scope. The Petitioner sought to demonstrate that an intern within its company does not leave the position with the same experience as an IT project manager, even if the intern role provides exposure to similar duties, performed under close supervision, for a portion of the time. The Petitioner has not supported its claim that the two positions are simultaneously "not substantially comparable," yet similar enough to be within the same occupation.

Based on the foregoing discussion, we agree that the Beneficiary's 24 months of experience as an intern does not meet the stated minimum requirement of 24 months of experience in the job offered.

III. CONCLUSION

The Petitioner has not demonstrated that the Beneficiary is qualified for the offered position because she does not meet the experience requirements stated on the labor certification. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.