U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 1857314

Date: JUNE 23, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a distributor of used clothing, seeks to employ the Beneficiary as a management analyst. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its ability to pay the position's proffered wage, its intention to permanently employ the Beneficiary in the position, or his possession of the minimum experience required for the position and the requested classification. Also, finding that the Beneficiary willfully misrepresented his qualifying experience, the Director invalidated the accompanying certification from the U.S. Department of Labor (DOL).

The Petitioner bears the burden of demonstrating eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. 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 DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that 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 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 considers whether a beneficiary meets the job requirements of a certified position. If USCIS approves a 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. ABILITY TO PAY THE 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 residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal income 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 from a petition's priority date. If a petitioner did not employ a beneficiary or did not pay him or her the full proffered wage, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the actual wages paid. If net income and net current assets are insufficient, USCIS may also consider additional factors affecting a petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[1]

Here, the labor certification states the proffered wage of the offered position of management analyst as $68,744 a year. The petition's priority date is December 1, 2010, 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).

The Petitioner demonstrated that it could pay the Beneficiary's individual proffered wage. But the Petitioner must establish its ability to pay the proffered wages of all its sponsored workers. As the Director found, the Petitioner filed a petition for another beneficiary after this petition's priority date. 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 here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petition from this petition's priority date of December 1, 2010, until the other 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, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple, pending petitions).

The Petitioner submits evidence that the proffered wage of its other petition was $34,860 a year. The Petitioner's tax returns for 2010 through 2016 reflect annual amounts of net current assets exceeding the petitions' combined proffered wages.[2] Thus, the record establishes the Petitioner's ability to pay the proffered wage. We will therefore withdraw the Director's contrary finding.

III. INTENTION TO PERMANENTLY EMPLOY THE BENEFICIARY

A petitioner must also intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a denial where, contrary to an accompanying labor certification, a petitioner did not intend

[1] 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); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

[2] As of the appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage in 2017 was not yet available. We will therefore consider the Petitioner's ability to pay only through 2016.

to employ a beneficiary as a domestic worker on a full-time, live-in basis). For labor certification purposes, the term "employment" means "[p]ermanent, full-time work." 20 C.F.R. § 656.3.

Here, the Petitioner stated on the petition and labor certification its intent to permanently employ the Beneficiary in the full-time, offered position of management analyst. The Director's notice of intent to deny (NOID) the petition, however, noted that a state website at that time indicated the Petitioner's "forfeiture" of its corporate status. *See* Tex. Comptroller of Pub. Accounts, "Taxable Entity Search," https://mycpa.cpa.state.tx.us/coa/ (last visited Oct. 5, 2018). The record therefore suggested that the Petitioner no longer conducted business. The Petitioner's NOID response contained updated evidence of its legal, corporate status. But, because the Petitioner did not submit proof of its current business operations, the Director concluded that it did not establish its intention to permanently employ the Beneficiary.

The Petitioner submits copies of updated quarterly payroll tax returns and other documentation, indicating its continuing business activities. Thus, a preponderance of evidence establishes the Petitioner's intention to permanently employ the Beneficiary in the offered position. We will therefore also withdraw this ground of denial.

IV. THE REQUIRED EXPERIENCE

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements 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 evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. 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 the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

A petitioner must also demonstrate that a beneficiary meets requirements of a requested immigrant classification. A beneficiary seeking classification as an advanced-degree professional must have an "advanced degree." Section 203(b)(2)(A) of the Act. That term means:

> any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

Here, the labor certification states the minimum requirements of the offered position of management analyst as a U.S. master's degree or a foreign equivalent degree in business administration, or a bachelor's degree followed by five years of experience.[3] The Petitioner seeks to qualify the Beneficiary for both the offered position and the requested classification based on his claimed

[3] As discussed in Part VI of this decision, the labor certification also contains additional requirements.

possession of a bachelor's degree and five years of experience. The Beneficiary's educational qualifications are not at issue.

The Beneficiary attested on the labor certification that, by the petition's priority date, he gained more than five years of full-time, qualifying experience as a management analyst. The Beneficiary stated that he worked about four years, eight months for a shipping supplier in the United States, from May 2005 through January 2010. The Beneficiary also stated that he worked about 14 months for an industrial company in Pakistan, from June 2000 to August 2001. Pursuant to 8 C.F.R. § 204.5(g)(1), the Petitioner submitted letters from the Beneficiary's former employers in support of his claimed, qualifying experience.

The NOID, however, notes various discrepancies in the Beneficiary's work history. On a labor certification application that his former U.S. employer filed for him in 2007, the Beneficiary attested that he did not begin working for the company until October 2006. The prior labor certification also states that he worked for another U.S. company as an internal auditor from May 2005 to May 2006. The NOID also notes inconsistencies regarding the Beneficiary's claimed employment in Pakistan. Both this petition and a 2008 petition for the Beneficiary included letters from his former Pakistani employer stating his employment from February 1997 to August 2001. The letters indicate that he began work as an accounts officer and, upon promotion on an unspecified date, served as an assistant manager of the management analysis department. In a letter with a 2011 petition for the Beneficiary, however, the Pakistani company stated that the Beneficiary worked from only June 2000 to August 2001, "join[ing]" the firm as a junior management analyst before being promoted to manager of the management analysis department. The discrepancies in the Beneficiary's work history cast doubt on his claimed possession of at least five years of qualifying experience. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

The Petitioner submits evidence resolving many of the discrepancies regarding the Beneficiary's work history. Tax and payroll records indicate that his former U.S. employer employed him from 2005 to 2010 as stated on the most recent labor certification. In 2005 and 2006, however, evidence indicates that, while remaining on the employer's payroll, the Beneficiary frequently traveled to the other U.S. company listed on the 2007 labor certification application. The evidence indicates that the other company shared common ownership with the employer and that the Beneficiary may have learned about the shipping business at the other company in connection with his position with the employer. The Petitioner also submitted business letters, certificates, and affidavits indicating that the Beneficiary began working at the Pakistani company as an accounts officer in 1997 before his promotion to the management analysis department in June 2000. The Petitioner also submitted evidence that the DOL considers management analyst and accountant/auditor as related occupations. Further, the Petitioner convincingly argues that the Beneficiary's learning of the shipping business with his former U.S. employer indicates the progressive nature of his experience. A preponderance of evidence therefore establishes that the Beneficiary gained qualifying experience in the specialty with the employers listed on this petition's labor certification.

The record, however, does not establish that the Beneficiary's former U.S. employer continuously employed him as a management analyst from May 2005 to January 2010 on a full-time basis. The Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, and other payroll records

indicating that the employer paid the Beneficiary less than $11,500 in both 2005 and 2006. In contrast, the record shows he earned annual amounts of more than $30,000 in later years. The Beneficiary's smaller earnings in 2005 and 2006 suggest that he worked part-time in those years. Also, the record does not explain the gap listed in the Beneficiary's work history on the 2007 labor certification from May 2006 to October 2006.

The Beneficiary's affidavit in response to the NOIR also suggests his part-time work in 2005 and 2006. The Beneficiary stated that he began working for his former U.S. employer after USCIS granted him employment authorization in May 2005. *See* 8 C.F.R. § 214.2(f)(10)(ii)(A) (authorizing certain nonimmigrant students to obtain employment authorization for "optional practical training" related to their fields of study). The Beneficiary said the employer "then offered a full-time job," suggesting that his initial work for the company was part-time in nature. For labor certification purposes, part-time employment equals only half the amount of full-time experience. *Matter of Cable Television Labs., Inc.*, 2012-PER-00449, 2014 WL 5478115 *1 (BALCA Oct. 23, 2014) (finding a foreign national's possession of 16 months of part-time employment equivalent to eight months of experience). Thus, if the Beneficiary worked part-time for his former U.S. employer in 2005 and 2006, he would not possess the five years of post-baccalaureate experience required for the offered position and the requested classification. Further, as the Director found, the record does not establish the Beneficiary's possession of at least five years of post-baccalaureate experience. The Petitioner submitted a copy of a diploma from a Pakistani university indicating that the Beneficiary received a degree equivalent to a U.S. baccalaureate on August 20, 2001. The record therefore does not establish that the Beneficiary's claimed, qualifying experience in Pakistan from June 2000 to August 2001 was post-baccalaureate in nature.

On appeal, the Petitioner submits a letter from a university official and argues that the Beneficiary passed the degree's final examination in May 2000. The record, however, does not establish the Beneficiary's completion of all degree requirements and the school's approval of the degree before the diploma's issuance in August 2001. Beneficiaries may gain post-baccalaureate experience before the issuances of their degree diplomas. *See Matter of O-A-, Inc.*, Adopted Decision 2017-03 (AAO Apr. 17, 2017). Although the beneficiary in *O-A-* received a bachelor's diploma from an Indian university in 2007, we measured her post-degree experience from the date of a "provisional certificate" the university issued her in 2006. *Id.* Thus, we found that the provisional certificate - together with the beneficiary's marks statements and a letter from a school official explaining the administrative delay in the issuance of her diploma - established her satisfaction of all substantive degree requirements and her school's approval of the degree before the issuance of her degree diploma. *Id.*

Unlike in *O-A-*, however, the Petitioner here has not provided evidence like a provisional certificate establishing that, before the issuance of the degree diploma, the Beneficiary satisfied all substantive degree requirements and the school approved his degree. The diploma and other university documentation indicate the Beneficiary's completion of the requisite coursework and passage of a final examination in May 2000. But, unlike in *O-A-,* the record does not establish the Beneficiary's satisfaction of all degree requirements or the school's approval of the Beneficiary's degree before the diploma's issuance in August 2001.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum five years of post-baccalaureate experience required for the offered position and the requested classification. We will therefore affirm the petition's denial on this ground.

V. INVALIDATION OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). USCIS may invalidate a labor certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact regarding the labor certification application." 20 C.F.R. § 656.30(d).

A willful misrepresentation of a material fact must be deliberate and voluntary, made with knowledge of its falsity. *Witter v. INS*, 113 F.3d 549, 554 (5th Cir. 1997) (citations omitted). A misrepresentation is material if it had a natural tendency to influence the government's decision. *Id.* (citing *Kungys v. United States*, 485 U.S. 759, 772 (1988)).

Here, the Director concluded that the Beneficiary willfully misrepresented his qualifying experience on the labor certification application. The Director reasoned that "the evidence of record does not show that the beneficiary actually has th[e] experience" stated on the application.

Although the record does not establish the Beneficiary's qualifying experience, the evidence does not support the willful misrepresentation finding. The Petitioner submitted independent, objective evidence resolving many of the discrepancies in the Beneficiary's work history. The record establishes that the Beneficiary worked for the employers listed on the labor certification application for the periods stated on the application. The record does not establish that all the Beneficiary's stated experience was post-baccalaureate and full-time in nature as required for the offered position and the requested classification. But the record lacks sufficient evidence that he willfully misrepresented his experience. We will therefore withdraw that portion of the Director's decision and reinstate the labor certification.

VI. THE JOB'S NEED FOR AN ADVANCED DEGREE PROFESSIONAL

Contrary to the Director's decision, the record also does not establish the offered position's need for an advanced degree professional. A labor certification accompanying a petition for an advanced degree professional "must demonstrate that the job requires a professional holding an advanced degree or the equivalent." 8 C.F.R. § 204.5(k)(4)(i). To qualify as an advanced degree professional, a beneficiary relying on foreign education must have a foreign degree that equates to at least a U.S. baccalaureate. When issuing the regulations, the former Immigration and Naturalization Service (INS) stressed that combinations of lesser educational credentials, or of education and experience, will not meet the degree requirement. *See* Final Rule for Employment-Based Immigrant Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (stating that "both the Act and its legislative history make clear that, in order to . . . have experience equating to an advanced degree under the second [preference category], *an alien must have at least a bachelor's degree*") (emphasis added).

Here, as previously indicated, the labor certification states that the offered position of management analyst requires a master's degree, or a bachelor's degree followed by five years of experience. Part H.14 of the labor certification ("Specific skills and other requirements"), however, also states: "Will accept a Bachelor's equivalent based on a combination of education as determined by a professional evaluation service."

The plain language of Part H.14 allows the Petitioner's acceptance of a combination of lesser educational credentials that a professional evaluation service determines equivalent to a U.S. bachelor's degree. The acceptance of a combination of lesser educational credentials, however, violates the classification requirements for advanced degree professionals requiring an actual bachelor's degree.

In its NOID response, the Petitioner cited a letter from a former INS official in response to an inquiry from a private attorney. *See* letter from Efren Hernandez III, Dir., Bus & Trade Servs., INS HQ70/6.2.8 (Jan. 7, 2003). The Petitioner interpreted the letter as allowing a beneficiary to combine multiple, foreign, educational credentials to satisfy the classification's degree requirement if supported by a proper evaluation. The letter, however, does not bind us in this matter. *See Matter of Izummi,* 22 I&N 169, 196 (Assoc. Comm'r 1998) (holding that guidance from INS's office of chief counsel did not bind the Agency's adjudicators). Moreover, the plain language of the regulations requires a single degree that either is a U.S. bachelor's degree or that equates to one. *See* 8 C.F.R. § 204.5(k)(2) (defining an "advanced degree" as including "[a] United States baccalaureate degree or a foreign equivalent degree" followed by at least five years of experience); 8 C.F.R. § 204.5(k)(3)(i)(B) (requiring a petitioner to submit "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" followed by at least five years of qualifying experience). The letter cited by the Petitioner therefore does not persuade us that a combination of educational credentials constitutes "a foreign equivalent degree" to meet the advanced degree category.

The Petitioner also asserted that DOL required the company's language in Part H.14 of the labor certification because the Beneficiary qualifies for the offered position based on the company's alternate job requirements of a bachelor's degree and five years of experience. *See Matter of Kellogg*, 94-INA-465, 1998 WL 1270641 *5 (BALCA Feb. 2, 1998) (*en banc*) (requiring labor certification employers to state their acceptance of U.S. applicants with any suitable combination of education, training, or experience where a foreign national potentially qualifies for a job based solely on alternate requirements). The Petitioner's language in Part H.14, however, is not the "*Kellogg* language." Contrary to *Kellogg*, Part H.14 does not state the Petitioner's acceptance of any suitable combination of education, training, or experience. Rather, Part H.14 states the Petitioner's acceptance of only combinations of education that a professional evaluation service determines equivalent to a U.S. bachelor's degree. The Petitioner's argument therefore is unpersuasive.

In any future filings in this matter, the Petitioner must demonstrate that the offered position requires an advanced degree professional.

VII. CONCLUSION

Contrary to the Director's decision, the record on appeal establishes the Petitioner's ability to pay the proffered wage and the company's intention to permanently employ the Beneficiary in the offered position. The record also does not support invalidation of the labor certification based on the Beneficiary's willful misrepresentation of his employment experience. The Petitioner, however, has not demonstrated the Beneficiary's possession of the minimum experience required for the position and the requested classification.

ORDER: The appeal is dismissed.

FURTHER ORDER: The ETA Form 9089, Application for Permanent Employment Certification, case number A-10335-35092, is reinstated.