



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

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

MATTER OF V-R-E-S-, LLC

DATE: MAY 3, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a real estate data and software provider, seeks to employ the Beneficiary as a Senior Software Engineer. 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 visa classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition, finding that the record did not establish that the Beneficiary had the qualifying experience required by the labor certification. The Director dismissed the Petitioner's subsequent motion to reopen because it did not meet the filing requirements for a motion.

The matter is now before us on appeal. The Petitioner submits additional evidence and asserts that the Beneficiary gained qualifying experience with the Petitioner, which the Beneficiary should be allowed to rely on to qualify for the position offered.¹ Upon *de novo* review, we will dismiss the appeal.

I. LAW AND PROCEDURE

A. The Roles of the DOL and USCIS in the Immigrant Visa Process

A United States employer may sponsor a foreign national for lawful permanent residence, which is a three-part process. First, the U.S. employer must obtain a labor certification, which the U.S. Department of Labor (DOL) processes. See 20 C.F.R. § 656, *et seq.* The employer does so by filing an ETA Form 9089, Application for Permanent Employment Certification, with the DOL. The ETA Form 9089 sets forth: (A) the position's job duties, (B) the position's education, experience and other special requirements, (C) the required proffered wage, and (D) the position's work location(s). In addition, as part of the labor certification, the beneficiary attests to his or her education and experience. The date the ETA Form 9089 is filed becomes the "priority date" for the visa petition.

¹ The Petitioner also maintains that the Director should have forwarded its motion to reopen to us for reconsideration, rather than requiring it to appeal the Director's decision on motion. However, the Petitioner's Form I-290B, Notice of Appeal or Motion, of June 29, 2015, identifies the filing as a motion to reopen, not an appeal. The Director therefore properly ruled on the motion without forwarding the filing to us.

8 C.F.R. § 204.5(d).² The DOL's role in certifying the labor certification is set forth at section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL's approval of the labor certification affirms that, "there are not sufficient [U.S.] workers who are able, willing, qualified" to perform the position offered where the beneficiary will be employed, and that employment of such beneficiary will not "adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.* The labor certification is valid for 180 days.

Following labor certification approval, a Petitioner files Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS) within the labor certification validity period. *See* 20 C.F.R. § 656.30(b)(1); 8 C.F.R. § 204.5. USCIS then examines whether: (A) the Petitioner can establish its ability to pay the proffered wage, (B) the degree and/or experience required for the position offered matches the petitioned-for classification, and (C) whether the beneficiary has the required education, training, and experience for the position offered. *See* section 203(b)(3)(A)(ii) of the Act; 8 C.F.R. § 204.5.

If the I-140 visa petition is approved, then in the third and final step, the beneficiary would file an I-485, Application to Adjust Status or Register Permanent Residence, either concurrently with the I-140 petition based on a current priority date, or following approval of an I-140 petition and a current priority date. *See* 8 C.F.R. § 245. If the I-485 is approved, this application to adjust status will afford the beneficiary lawful permanent resident status.

Here, as required by statute, the I-140 petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by DOL. The priority date of the petition is July 23, 2014. The petitioner properly filed the Form I-140 on March 6, 2015, within the allowed 180 day labor certification validity period, December 23, 2014 to June 21, 2015. *See* 20 C.F.R. § 656.30(b)(1).

B. The Beneficiary's Qualifications

A petitioner must establish a beneficiary's possession of all the education, training, or experience stated on an accompanying labor certification at the time of a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). We must examine "the language of the labor certification job requirements" in order to determine what the job requires." *Id.* "We must examine the certified job offer *exactly* as it is completed by the prospective employer." *See Rosedale Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). Interpretation of the job's requirements, as stated on the

² The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g).

(b)(6)

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labor certification involves reading and applying the plain language of the labor certification application form. *Id.*, at 834.

Part H. of the ETA Form 9089 sets forth the following requirements for the offered position of “Senior Software Engineer”:

- H.4. Education: Bachelor’s.
- H.4-B. Major field of study: Computer Science or related field.
- ...
- H.6. Experience in the job offered: Required.
- H.6-A. Number of months experience required: 60.
- H.7. Alternate field of study: Accepted.
- H.7-A. Major in alternate field of study: Information Technology.
- H.8. Alternate combination of education and experience: None accepted.
- ...
- H.10. Experience in an alternate occupation: Not accepted.
- H.11. Job duties: Develop and document software based requirements, resolve code defects and identify software risks.
- ...

Therefore, to satisfy the requirements of the labor certification, the Beneficiary must: (A) hold a U.S. bachelor’s or foreign equivalent degree in computer science, information technology, or a related field, and (B) have five years of experience in the job offered, i.e., as a Senior Software Engineer.

The record reflects that the Beneficiary has a four-year bachelor of engineering degree specialized in information technology from the [REDACTED] India issued in December 2004. This degree is the foreign equivalent of a U.S. bachelor’s degree in a field related to computer science or information technology as allowed by the certified labor certification. At issue, therefore, is whether the Beneficiary possesses the required 60 months of experience as a Senior Software Engineer.

As part of the labor certification, the Beneficiary attested to his employment with the Petitioner as a Senior Software Engineer since November 2, 2009, meaning he had approximately 57 months of full-time experience with the Petitioner before the labor certification’s July 23, 2014 priority date.

A Petitioner generally cannot count qualifying experience that a Beneficiary gained with the same employer that filed the labor certification, unless the experience was in a position “not substantially comparable” to the offered position, or the employer demonstrates that it is no longer feasible to train a worker to qualify for the position. 20 C.F.R. §§ 656.17(i)(3)(i), (ii). A “substantially comparable” position means one “requiring performance of the same job duties more than 50 percent of the time.” 20 C.F.R. §656.17(i)(5)(ii).

Stated otherwise, the Beneficiary's experience with the Petitioner can be used where the position duties are at least 50 per cent different than the duties of a Senior Software Engineer, and if the Petitioner allowed for experience in an alternate occupation in H.10. Here, that is not the case.

In the instant case, the Petitioner asserts that the Beneficiary gained qualifying experience with it in a position not substantially comparable to the offered position. In a March 16, 2014, letter accompanying the petition, the Petitioner states that the offered position would constitute "a promotion" for the Beneficiary to work on "larger[,] more critical" software systems. However, the Petitioner's assertion is inconsistent with the labor certification. The job duties for the offered position listed in H.11 are nearly identical to the job duties for the position in which the Beneficiary claims to have gained his experience, including developing and documenting software based requirements, resolving code defects and identifying software risks.

If the Beneficiary's qualifying experience with the Petitioner is in the job offered, then 20 C.F.R. § 656.17(i)(3) bars the Petitioner from counting the experience. On the other hand, if the Beneficiary's experience with the Petitioner is in a position not substantially comparable to the offered position, then his experience is not "in the job offered" as required by the labor certification. In either event, the result is the experience cannot be used to establish that the Beneficiary has the 60 months of experience required.

Even if the Beneficiary's experience with the Petitioner could be accepted, this experience standing alone is less than the required 60 months of qualifying experience to meet the terms of the certified labor certification.

The Petitioner asserts that based on the labor certification's continued validity until June 21, 2015, the Beneficiary could establish that he has more than 60 months of qualifying experience with the Petitioner. Essentially, the Petitioner seeks to additionally rely on the Beneficiary's experience between the date of filing the labor certification, July 23, 2014, and the end of the 180 day labor certification validity time period of June 21, 2015.

However, as previously indicated, we cannot consider education or experience obtained by a beneficiary after a petition's priority date. *See Wing's Tea House*, 16 I&N Dec. at 160; *Katighak*, 14 I&N Dec. at 49. The June 21, 2015 date represents the validity date within which an employer must first submit the certified ETA Form 9089 in support of a Form I-140 petition. *See* 20 C.F.R. § 656.30(b)(1).

Although not stated on the accompanying labor certification, the record contains evidence of the Beneficiary's possession of about 55 months of experience with three prior employers. A beneficiary's experience, without such fact certified by the DOL on the underlying labor certification, lessens the credibility of the evidence and facts asserted. *Matter of Leung*, 16 I&N Dec. 12, 14-15 (BIA 1976), *disapp'd of on other grounds*, *Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978). However, even if we credited this 55 months of purported experience, it would fall short of the 60 months required by the accompanying labor certification. Also, the Petitioner states that only about 40 months of that prior, purported experience involved performance of the same job

duties as the offered position. As discussed above, the Petitioner did not allow for acceptance of experience in any alternate occupation in H.10 of the ETA Form 9089, and the remaining 15 months of experience in alternate occupations cannot be used to demonstrate that the Beneficiary had the experience required.

For the foregoing reasons, the record does not establish that the Beneficiary has the required 60 months of qualifying experience in the offered position as stated on the accompanying labor certification by the petition's priority date. We will therefore affirm the Director's decision.

C. The Petitioner's Ability to Pay the Proffered Wage

A petitioner must demonstrate its 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 include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

The Director did not deny the decision on this basis, and we do not deny the appeal on this basis either. However, we note that the record does not contain the required evidence of the Petitioner's ability to pay from 2014, the year of the petition's priority date, onward as the petitioner's tax return would not have been available at the time of filing. Therefore, in any future filings in this matter, the Petitioner must submit copies of annual reports, federal tax returns, or audited financial statements from 2014 onward pursuant to 8 C.F.R. § 204.5(g)(2).

II. CONCLUSION

A petitioner must establish the elements for the approval of a petition at the time of filing. *Katigbak*, 14 I&N Dec. at 49. In the present case, the record does not establish that the Beneficiary had five years of experience in the job offered as required by the labor certification by the visa petition's July 23, 2014, priority date. For this reason, we will affirm the Director's decision and dismiss the appeal.

In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of V-R-E-S-, LLC*, ID# 16033 (AAO May 3, 2016)