U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15738244

DATE: APR. 15, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a restaurant, seeks to employ the Beneficiary as a cook specializing in Thai food. It requests classification for the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Nebraska Service Center initially approved the petition, but subsequently revoked the approval. In the revocation decision the Director indicated that the record contained conflicting evidence about the Beneficiary's employment history and therefore did not establish that the Beneficiary had the requisite experience to meet the terms of the labor certification that accompanied the petition. On appeal the Petitioner asserts that the Director did not properly consider the documentation it submitted and that the evidence establishes the Beneficiary's qualifying experience as claimed in the labor certification.

Upon *de novo* review, we will withdraw the Director's decision. We will remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the 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. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national 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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

II. ANALYSIS

The petition in this case was filed in April 2018, requesting "other worker" classification for the Beneficiary. The accompanying labor certification specified that 12 months of experience in the job offered was required to qualify for the proffered position, and asserted that the Beneficiary acquired that experience by working at the [redacted] in [redacted] Thailand, over a two and one half year period from January 1, 2010, to June 30, 2012.[1] The initial evidence included a letter dated June 30, 2012 on the letterhead of [redacted] in [redacted] Thailand, ostensibly signed by [redacted], owner of the restaurant, asserting that the Beneficiary had been employed as a full time cook from January 1, 2010, to June 30, 2012, and briefly describing her cooking-related duties. In response to a request for additional evidence the Petitioner submitted a second employment verification letter dated May 18, 2018, once again on the letterhead of [redacted] and ostensibly signed by owner [redacted] which reiterated the assertion that the Beneficiary was employed as a full time cook from January 1, 2010, to June 30, 2012, and provided more comprehensive descriptions of the restaurant's menu and the Beneficiary's alleged cooking and cooking-related duties. The petition was approved in August 2018.

In December 2019, however, the Director sent the Petitioner a NOIR stating that "USCIS conducted a[n] investigation at [redacted] and found that the [B]eneficiary never worked there." Based on this information the Director indicated that the Beneficiary did not appear to meet the minimum experience requirement of the labor certification, and thus did not qualify for the proffered position.

In response to the NOIR the Petitioner submitted a third employment verification letter dated December 10, 2019, once again on the letterhead of [redacted] and ostensibly signed by owner [redacted], which reiterated the assertion that the Beneficiary was employed as a full time cook from January 1, 2010, to June 30, 2012. In her letter the owner claimed that when USCIS

[1] The regulation at 8 C.F.R. § 204.5(l)(ii)(D) provides that "[i]f the petition is for an unskilled (other) worker, it must be accompanied by evidence that the [beneficiary] meets any educational, training and experience, and other requirements of the labor certification."

officers visited the restaurant she stated that the Beneficiary was not a former employee because she did not recognize her name, but that she now realized the Beneficiary was an employee who went by the nickname [redacted] and had a different surname then because it was prior to her marriage. The Petitioner also submitted two short letters, one from [redacted], [redacted]'s husband who managed the restaurant, and the other from a longstanding customer of the restaurant, both of whom attested that the Beneficiary used to work there as a full time cook.

The Director sent the Petitioner a second NOIR in February 2020, reiterating the statement in its initial NOIR that "USCIS conducted a[n] investigation of [redacted] and found that the [B]eneficiary never worked there," while acknowledging receipt of the Petitioner's claim that the Beneficiary did work at the restaurant when she was known by the nickname [redacted] The Director requested the submission of tax documents to support the claim that the Beneficiary was employed at the restaurant during the years 2010-2012.

In response to the second NOIR the Petitioner asserted that it was unreasonable to request additional documentation of the Beneficiary's employment so long ago. The Petitioner submitted two more letters from the co-owner and manager of [redacted] dated February 26 and 28, 2020, respectively, both of whom claimed that the Beneficiary was paid in cash. The Petitioner also submitted a letter from another longstanding customer of the restaurant who attested that the Beneficiary was employed as a full time cook.

The Director proceeded to revoke the approval of the petition. The Director recounted the letters submitted in response to the two NOIRs but indicated that the record did not contain "substantiating evidence" to establish the Beneficiary's employment by the restaurant. Referencing the USCIS site visit once again, the Director stated that "[t]he site visit conducted [in] January 2019 indicated that [redacted] [and her husband] did not recognize the [B]eneficiary's name" and were unable "to verify the [B]eneficiary's employment." Citing *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), the Director concluded that the Petitioner had not resolved the evidentiary inconsistencies in the record and had not established that the Beneficiary had one year of experience as a cook specializing in Thai food, as required by the labor certification to qualify for the job offered.

On appeal the Petitioner restates its claim that the Beneficiary gained the qualifying experience required by the labor certification by working at the [redacted] as a cook from January 2010 to June 2012 and reviews the employment verification letters submitted in response to the two NOIRs. The Petitioner contends that the Director's revocation decision was arbitrary because it did not explain why these letters were "not given credence" and were not considered "substantiating evidence" of the Beneficiary's employment by [redacted]

Upon review of the entire record we note that the NOIRs issued by the Director were incorrect insofar as they stated that USCIS, based on its site visit to the [redacted] "found that the [B]eneficiary never worked there." That is not what USCIS determined in its site visit. USCIS investigators talked with the restaurant's owner, [redacted] who stated that she did not author any employment verification letter on behalf of the Beneficiary, and provided her signature as evidence that the signature appearing on the employment verification letter(s) submitted in this proceeding is not hers. However, [redacted] also acknowledged that the Beneficiary is her

cousin and that she did employ the Beneficiary on a part-time basis for one or two years before her travel to the United States.[2] According to [redacted] the Beneficiary's duties were limited to delivering goods from the restaurant to vendors. Thus, the USCIS site visit indicates that the Beneficiary did work at the [redacted] contrary to what the Director stated in the NOIRs, though perhaps not in a cooking capacity.

In sum, the facts presented in the NOIRs were neither accurate nor complete and did not correctly describe the supporting evidence. These shortcomings were reflected in the revocation decision, which is incorrect insofar as it states that the restaurant's owner and her husband were unable "to verify the [B]eneficiary's employment" at the restaurant. As discussed above, the USCIS site visit confirmed that the Beneficiary did work at the [redacted], though perhaps not in a cooking capacity.

We conclude that the NOIRs issued by the Director did not comply with the requirements articulated in *Matter of Estime* because they did not include "a specific statement . . . of the facts underlying the proposed [revocation]" with an accurate description of "the supporting evidence." Accordingly, we will remand this matter for the Director to issue a new NOIR setting forth in greater detail "the facts underlying the proposed action" and "the supporting evidence," consistent with *Matter of Estime*.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for the issuance of a new NOIR in accordance with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. Following the Petitioner's response to the NOIR, or the expiration of the time period for response, the Director shall issue a new decision.

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

[2] USCIS records show that the Beneficiary was issued a B1/B2 visa with a 10-year validity on February 18, 2015, and entered the United States with that visa the following month. In her visa application the Beneficiary asserted that she was employed as an accountant by a construction company in Thailand, though that was after the time she assertedly worked for the [redacted] as a cook.