U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF 1305F- CORP.

DATE: APR. 16, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a restaurant operator, seeks to employ the Beneficiary as a cook specializing in Indian cuisine. It requests his classification 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, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least two years of training or employment experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum experience required for the offered position and the requested classification.

On appeal, the Petitioner submits additional evidence. The Petitioner asserts that, although the Beneficiary's prior employer did not place him on its payroll, the record demonstrates his full-time, qualifying experience for the offered position and requested classification.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that the United States lacks sufficient able, willing, qualified, and available workers for the offered position and that employment of a foreign national in the job will not harm the wages or working conditions of U.S. workers similarly employed. *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). Section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a foreign national meets the requirements of the DOL-certified position and the requested immigrant classification. If USCIS grants a petition, a

foreign national may finally apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE REQUIRED EXPERIENCE

As previously indicated, a skilled worker must have at least two years of training or experience. Section 203(b)(3)(A)(i) of the Act; 8 C.F.R. § 204.5(l)(2) (defining the term "skilled worker"). A petitioner must also establish 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 evaluating 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 additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of Indian specialty cook as two years of experience in the job offered. The position does not require any education or training. Experience "in the job offered" means experience performing the primary duties of the offered position. *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 4 (BALCA Oct. 24, 2012). The labor certification states the job duties of this position as "[p]repar[ing] and cook[ing] Indian style lunches, dinners and desserts."

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than two years of full-time, qualifying experience. He stated that he worked as an Indian specialty cook at another U.S. restaurant from October 2009 through December 2011.

A petitioner must support claimed, qualifying experience with a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must provide the name, address, and title of the employer, and describe the beneficiary's experience. *Id.* The Petitioner here submitted a letter from a general manager of the other restaurant where the Beneficiary claims to have worked. Consistent with the information on the labor certification, the letter states the Beneficiary's dates of employment as October 2009 through December 2011. The letter also states: "During his employment with us [the Beneficiary] prepared and cooked Indian food for banquet parties."

The Director found the letter insufficient to establish the Beneficiary's qualifying experience. In a request for additional evidence (RFE), the Director noted that New York state authorities dissolved the other restaurant in [redacted] 2011 and did not restore its corporate status until [redacted] 2012. The Director therefore questioned whether the Beneficiary gained at least two years of experience by working for the restaurant beyond its [redacted] 2011 dissolution date. The Director also found that the letter suggested the Beneficiary's preparation of Indian food only for banquets, not on a regular basis. The Director therefore requested additional evidence of the Beneficiary's employment at the other restaurant regarding his hours and how often he prepared Indian food.

[1] This petition's priority date is October 17, 2014, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner's RFE response included documentation that the other restaurant continued doing business while dissolved and an affidavit from the Beneficiary stating his full-time employment by the restaurant as an Indian specialty cook. The Petitioner's president/owner also attested to the Beneficiary's full-time employment in the offered position, disclosing that the Petitioner's president/owner also owned the other restaurant.

We agree with the Director's findings that, although the Petitioner demonstrated the other restaurant's business operations from July 2011 to August 2012, the Petitioner did not establish the other restaurant's full-time employment of the Beneficiary in the job offered for at least two years. The letter from the other restaurant's general manager appears to comply with 8 C.F.R. § 204.5(l)(3)(ii)(A). But the record casts doubt on the letter's authenticity. In support of a prior, unsuccessful petition for the Beneficiary, the Petitioner submitted a virtually identical letter of the same date from the same general manager. *See Matter of 1-0-F-Corp.*, ID# 11835 (AAO Aug. 5, 2016). The stationery of the previously submitted letter, however, displays the other restaurant's name and address in a different font than the stationery of the most recently submitted letter. The discrepancy suggests that the restaurant did not issue both documents. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record pointing to where the truth lies).

Also, the other restaurant's ownership by the Petitioner's president/owner casts additional doubt on the Beneficiary's claimed, qualifying experience. The president/owner and the Beneficiary have interests in this petition's approval. Thus, their affidavits stating the Beneficiary's prior, full-time employment in the offered position are biased. The other restaurant's general manager apparently worked for the Petitioner's president/owner. The general manager's letters may therefore also be prejudiced. The record lacks sufficient, independent, objective evidence of the Beneficiary's claimed, qualifying experience.

On appeal, the Petitioner submits letters from two suppliers of the other restaurant. The letters state the Beneficiary's full-time work there as a cook from October 2009 to December 2011. The letters, however, have limited evidentiary value. Neither letter states the Beneficiary's regular preparation of Indian food. The letters are also dated almost seven years after the Beneficiary purportedly stopped working at the restaurant. The suppliers' abilities to accurately recall the Beneficiary and the details of his work are therefore questionable. The letters' contents also include identical phrases, suggesting that they do not reflect the personal knowledge of their signatories.

The Petitioner asserts that we are demanding more evidence of the Beneficiary's qualifying experience than required under 8 C.F.R. § 204.5(g)(1). Like 8 C.F.R. § 204.5(l)(3)(ii)(A), § 204.5(g)(1) generally requires a petitioner to submit a letter from a beneficiary's former employer. If required evidence is suspect, however, we may seek additional proof. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). Here, as discussed above, the Petitioner provided a letter from the Beneficiary's claimed former employer in a font different than that of a previously submitted letter of the same date. Because the discrepancy casts doubt on the letters' authenticity, we may seek additional evidence.

The Petitioner also argues that the Beneficiary gained qualifying experience even though he lacked authorization to work at the other restaurant and received payment "under-the-table." *See Matter of*

B&B Residential Facility, 2001-INA-00146, 4 (BALCA July 16, 2002) (holding that labor certification employers may rely on experience foreign nationals gained while working in avoidance of labor and tax laws). We agree. We do not discredit the Beneficiary's claimed, qualifying experience because of its unauthorized, under-the-table nature. Rather, we discredit it for lack of sufficient evidence. As the Board of Alien Labor Certification Appeals (BALCA) cautioned in *B&B*, off-the-books experience "may be difficult to document." *Id.* BALCA recognized that, "in order to carry the burden of proof, the applicant will undoubtedly need to present credible supporting documentation of the work and/or corroborating affidavits or declarations of witnesses with personal knowledge." *Id.* Thus, we do not object to the unauthorized nature of the Beneficiary's claimed qualifying experience; we simply find insufficient evidence of his qualifying experience.

Finally, the Petitioner cites a precedent case of the U.S. Court of Appeals for the Second Circuit, which has jurisdiction over the geographic area of intended employment in this matter. *See Paul v. Gonzales*, 444 F.3d 148 (2d Cir. 2006). In *Paul*, the Second Circuit allowed a foreign national to proceed with an asylum claim based on a fear of future persecution, even though an Immigration Judge found that the alien did not credibly testify about past persecution in a prior claim. *Id.* at 150. The Petitioner argues by analogy that doubt cast on certain evidence of the Beneficiary's qualifying experience should not undermine all of the proof.

Paul, however, explicitly limits its holding to applications for asylum and withholding of removal. *Id.* at 154; *see* sections 208 & 241(b)(3) of the Act, 8 U.S.C. §§ 1158, 1231(b)(3). The Second Circuit stated that "we now expressly hold, that, *with respect to petitions for both asylum and withholding of removal*, an applicant may prevail on a theory of future persecution despite an IJ's adverse credibility ruling as to past persecution." *Id.* (emphasis added). *Paul* therefore does not apply to this matter. Rather, we remain guided by *Ho*'s holding that "[d]oubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591. In a case involving immigrant petition proceedings, the Second Circuit cited approvingly to *Ho*. *See Risoli v. Nielsen*, 734 Fed.Appx. 61, 63 (2d Cir. 2018). Our analysis therefore agrees with Second Circuit case law.

III. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum experience required for the offered position or the requested classification. We will therefore affirm the petition's denial for the reasons stated above, with each considered an independent and alternate ground of denial. A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of 1305F- Corp.*, ID# 3626059 (AAO Apr. 16, 2019)