U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-M-

DATE: APR. 19, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a sole proprietorship that operates a convenience store with a restaurant, seeks to permanently employ the Beneficiary as a chef, specializing in Korean foods. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director concluded that the record did not establish, as required, the Beneficiary's possession of the experience required for the offered position and the requested classification.

On appeal, the Petitioner submits additional evidence and asserts the Beneficiary's qualifications for the offered position and the requested classification.

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

I. LAW AND ANALYSIS

A. Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, a U.S. employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (labor 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). Next, the employer must file a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves the immigrant visa petition, a 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.

By approving the labor certification in this case, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of chef. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of 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)(II).

In these proceedings, USCIS must determine whether the Beneficiary meets the requirements of the offered position certified by the DOL. We must also determine whether the Petitioner and the Beneficiary qualify for the requested immigrant classification. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service "makes its own determination of the alien's entitlement to [the requested] preference status").

B. The Beneficiary's Possession of the Required Experience

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date.[1] 8 C.F.R. § 103.2(b)(l), (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). As previously noted, a skilled worker must also possess at least two years of training or experience. Section 203(b)(3)(A)(i) of the Act.

In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

The labor certification states the minimum requirements of the offered position of chef as 24 months, or two years, of experience in the job offered. The labor certification states that no education or training is required.

On the labor certification, the Beneficiary attested to her possession of about 40 months of full-time employment by restaurant in South Korea as a chef, specializing in Korean foods, from May 1, 2008, to August 20, 2011. A petitioner must support a beneficiary's claimed qualifying experience with a letter from an employer. 8 C.F.R. § 204.5(g)(1). The letter must provide the name, address, and title of an employer, and a description of a beneficiary's experience. *Id.* Here, the Petitioner did not initially provide a letter from the Beneficiary's purported former employer. Therefore, in a request for evidence (RFE), the Director requested one. The RFE also informed the Petitioner of a discrepancy regarding the Beneficiary's employment history. The RFE stated that the Beneficiary's August 5, 2011, application

[1] In this case, the petition's priority date is July 16, 2015. This is the date the 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).

for a nonimmigrant student visa listed her employment at that time as an "office worker." Thus, during the Beneficiary's purported tenure as a chef, the student visa application stated her employment in a different occupation, casting doubt on her claimed qualifying experience.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner must therefore explain the discrepancy between the occupations listed on the labor certification and the Beneficiary's student visa application. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). Accordingly, the Director's RFE requested the Petitioner to explain the discrepancy in the Beneficiary's occupation and to submit a certificate of income from the National Tax Service of Korea as proof of the Beneficiary's claimed, qualifying experience.

In response to the RFE, the Petitioner submitted an employment certificate from Hachi's president on the restaurant's stationery. The certificate states the restaurant's employment of the Beneficiary as a chef from May 1, 2008, to August 20, 2011, and describes her job duties. The Petitioner also submitted a second certificate from president. Because the restaurant paid the Beneficiary in cash, the second certificate indicates that tax records of the Beneficiary's employment do not exist. In addition, in an affidavit, the Beneficiary attributed the discrepancy in her occupations to an omission by an agent who completed the student visa application on her behalf. The Beneficiary stated that she told the agent that she worked as both a chef and an office worker. But she stated that the agent omitted her work as a chef from the visa application, listing only her employment as an office worker.

In response to the Director's subsequent notice of intent to deny, the Petitioner further provided a letter from an "action officer" on the stationery of city in South Korea. The letter states that the officer worked as a health inspector from 2006 to 2013 and annually inspected restaurant. The letter states that the Beneficiary "was serving as a chef at the restaurant for many years." In denying the petition, the Director found that the Petitioner had not overcome the discrepancies in the record to establish that the Beneficiary possessed the required experience.[2]

On appeal, the Petitioner asserts that the Beneficiary sufficiently explained the discrepancy in her occupation on the student visa application, and that the certificate from and the letter from the former health inspector establish her claimed employment as a chef. But we find the record insufficient to establish the Beneficiary's claimed qualifying experience.

The Form G-325A, which was dated January 28, 2016, required the Beneficiary to list her employment for the past five years. *See* 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations). If the Beneficiary served as an office worker while working as a chef until August 2011 as she claims, the record does not explain why she did not list her employment as an officer worker on the Form

[2] The Director also stated that the Beneficiary omitted her claimed employment by restaurant on a Form G-325A, Biographic Information, that she submitted with her application for adjustment of status. But as the Petitioner notes on appeal, the record shows that she listed the employment on the form.

G-325A. This unresolved inconsistency casts doubt on the Beneficiary's claims that she simultaneously worked as a chef and an officer worker, that she told an agent who completed her student visa application of her dual occupations, and that she has the qualifying experience for the offered position and the requested classification. *See Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). As noted by the Director, the record also lacks independent, objective evidence that the Beneficiary told an agent of her purported dual occupations or that the agent omitted her experience as a chef from the visa application.

Also, the letter from the purported, former health inspector is vague. The letter does not detail how the letter's signatory obtained personal knowledge of the Beneficiary's employment by and does not specify the Beneficiary's dates of employment at the restaurant. Moreover, the labor certification and the certificate state the restaurant's location in But the letter from the purported, former health inspector is on the stationery of which appears to be a different city than The record does not explain for which city the letter's signatory worked as a health inspector. If the signatory worked as a health inspector for where restaurant is purportedly located, the record lacks evidence of his employment by that city. *See Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

For the foregoing reasons, the record does not establish the Beneficiary's possession of the experience required for the offered position and the requested classification.

C. The *Bona Fides* of the Job Opportunity

Although unaddressed by the Director, the record also does not establish the *bona fides* of the job opportunity. A skilled worker petition must be accompanied by a valid individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i). If an accompanying labor certification does not comply with DOL regulations, we may deny a petition. *See Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where the labor certification did not authorize the beneficiary to work at the intended jobsite).

In this case, the Petitioner attested on the labor certification that "[t]he job opportunity has been and is clearly open to any U.S. worker." *See* 20 C.F.R. § 656.10(c)(8) (requiring an employer to so attest). The record, however, indicates that the Beneficiary has a special relationship with the Petitioner that casts doubt on the *bona fides* of the job opportunity. *See Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000) (holding that a relationship triggering concerns about the *bona fides* of a job opportunity "is not only of the blood; it may also be financial, by marriage, or through friendship").

In determining the *bona fides* of a job opportunity, we must consider several factors, including whether the foreign national: is in a position to control or influence hiring decisions regarding the offered position; is related to the employer's owners, officers, or employees; incorporated or founded the employer; has an ownership interest in it; is involved in its management; is on its board of directors; is

one of a small number of employees; possesses specialized or unusual job requirements of the offered position; or has personal attributes that would likely cause the employer to cease operations in the foreign national's absence. *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *8 (BALCA 1991) (*en banc*). We must also consider the employer's level of compliance and good faith in processing the claim. *Id.*

Here, the Petitioner responded "Yes" to part C.9 of the labor certification, which asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" The Petitioner's federal income tax return for 2014 does not identify the Beneficiary as an owner of the sole proprietorship. The record therefore suggests that the Beneficiary has a familial relationship with the Petitioner's co-owners, who are a married couple.

Also, copies of Forms I-20, Certificates for Eligibility for Nonimmigrant (F-1) Student Visa Status, submitted with the application for adjustment of status of the Beneficiary's spouse, state that one of the Petitioner's co-owners financially supported the Beneficiary and her spouse from 2011 to 2014 while she studied English language and literature in the United States and identifies this individual as a "relative." This evidence of financial support indicates the existence of a business, familial, or other personal relationship between the Beneficiary and the Petitioner before the labor certification's filing.

In addition, the Form I-140 and tax records submitted by the Petitioner indicate that it has one employee. The record therefore establishes that the Beneficiary would be one of a small number of employees, another factor indicating a non-*bona fide* job opportunity. Thus, multiple *Modular Container* factors indicate that the offered position was not clearly available to U.S. workers, potentially rendering the labor certification invalid.

Pursuant to 20 C.F.R. § 656.17(l), in any future filings in this matter, the Petitioner must demonstrate the existence of a *bona fide* job opportunity and provide copies of the following materials:

- The Petitioner's business license;
- A list of the Petitioner's owners and their relationships to each other and the Beneficiary;
- The Petitioner's financial history, including the total investment in it and the amount of investment by each owner and the Beneficiary;
- The name of the person with primary responsibility for interviewing and hiring applicants, and the names of people with influence or control over hiring decisions for the offered position; and

- Documentation of any familial relationship between the Petitioner's owners, employees, and the Beneficiary.

In addition, the Petitioner should provide copies of its labor certification materials, including: the notice of filing; the prevailing wage determination; newspaper advertisements of the offered position; as described in 20 C.F.R. § 656.17(g)(1), the recruitment report; resumes or applications received from applicants; and any correspondence between the Petitioner and the DOL.

D. The Petitioner's Intention to Employ the Beneficiary in the Offered Position

The record also does not establish the Petitioner's intention to employ the Beneficiary in the offered position on a full-time basis.

A business may file a petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). A petitioner must intend to employ a beneficiary pursuant to 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 petition's denial where a petitioner did not intend to employ a beneficiary pursuant to the labor certification as a domestic worker on a live-in, full-time basis).

For labor certification purposes, the term "employment" means "[p]ermanent, full-time work by an employee for an employer other than oneself." 20 C.F.R. § 656.3 (defining the term "employment").

In this case, the Petitioner states its intention to employ the Beneficiary as a chef, specializing in Korean foods. But evidence of record casts doubt on the Petitioner's intention to employ the Beneficiary on a full-time basis.

On Form I-140, the Petitioner indicated its current employment of one worker and stated that the offered position is not new. The Petitioner therefore appears to employ its only current worker in the offered position of chef. The Petitioner provided copies of IRS Forms 941, Employer's Quarterly Federal Tax Returns, indicating that it paid its sole employee, the chef, total wages of $15,600 in 2015. Similarly, the Petitioner's 2014 federal income tax return indicates its payment of $20,280 in wages that year. Compared to the annual proffered wage of $48,464 stated on the labor certification for the chef position, the amounts of the employee wages in 2014 and 2015 suggest that the position of chef may only be part-time in nature. The evidence therefore casts doubt on the Petitioner's intention to employ the Beneficiary in the position of chef on a full-time basis.

E. The Petitioner's 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 include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In this case, as previously noted, the proffered wage of the offered position is $48,464 per year, and the petition's priority date is July 16, 2015. The Petitioner submitted a copy of its federal income tax return for 2014. But the Petitioner did not submit required, initial evidence of its ability to pay the proffered wage in 2015, the year of the petition's priority date.

Pursuant to 8 C.F.R. § 204.5(g)(2), in any future filings in this matter, the Petitioner must submit annual reports, federal income tax returns, or audited financial statements for 2015 and, if available, 2016.

II. CONCLUSION

The record does not establish the Beneficiary's possession of the experience required for the offered position and the requested classification. We will therefore affirm the Director's decision. The record also does not establish the *bona fides* of the job opportunity, the Petitioner's intention to employ the Beneficiary in the offered position on a full-time basis, or the Petitioner's ability to pay the proffered wage.

ORDER: The appeal is dismissed.

Cite as *Matter of J-M-*, ID# 251216 (AAO Apr. 19, 2017)