U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-H-

DATE: APR. 21, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a jewelry store operator, seeks to permanently employ the Beneficiary as a sales and marketing manager. It requests his classification as a professional or skilled worker under the third-preference immigrant category. *See* Immigration and Nationality Act (the Act) sections 203(b)(3)(A)(i)-(ii), 8 U.S.C. § 1153(b)(3)(A)(i)-(ii). These classifications allow a U.S. business to sponsor a foreign national with a bachelor's degree, or at least two years of training or experience, for lawful permanent resident status.

After the petition's initial approval, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that the record did not establish: the Beneficiary's possession of the minimum education required for the offered position; the *bona fides* of the job offer; or the Petitioner's ability to pay the proffered wage.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in revoking the petition's approval.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further proceedings consistent with the following opinion and for the entry of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving a labor certification, the DOL certifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position and that a foreign national's employment in the position will not hurt the wages and working conditions of U.S. workers in similar jobs. 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

[1] In cases like this one, a labor certification's filing date becomes a petition's "priority date." By that date, a beneficiary must meet all the job requirements of an offered position stated on a labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l Comm'r 1977).

204 of the Act, 8 U.S.C. § 1154. Finally, 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.

Until a beneficiary obtains lawful permanent residence, USCIS may revoke a petition's approval with notice "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, USCIS' erroneous approval of a petition may merit revocation. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988).

USCIS properly issues a notice of intent to revoke (NOIR) where the record as of the notice's issuance, if unexplained and unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, good and sufficient cause exists to revoke a petition's approval if the evidence as of the revocation, including any explanation or rebuttal evidence submitted in response to a NOIR, warranted the petition's denial. *Id.* at 452.

II. ANALYSIS

A. The Beneficiary's Educational Qualifications

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, e.g., Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (finding that "DOL bears the authority for setting the content of the labor certification and [the immigration service] cannot impose job qualifications beyond those contemplated therein").

In this case, the labor certification states the minimum educational requirement of the offered position of sales and marketing manager as a four-year bachelor's degree in business administration. The Beneficiary attested that, in India, he attained a three-year bachelor of commerce degree followed by a two-year master of business administration (MBA) degree.

As of the petition's approval, the record contained a copy of the Beneficiary's bachelor's degree and an expert opinion evaluating his foreign educational credentials. The evaluation concludes that the Beneficiary has the equivalent of a U.S. bachelor's degree in business administration based on a combination of his bachelor's degree and his first year of MBA studies.

The Director's NOIR properly questioned the Beneficiary's educational qualifications for the offered position. As of the NOIR's issuance, the record lacked documentation of the Beneficiary's graduate studies. Because the evaluation's conclusion relied in part on the graduate studies, the record did not support the evaluation's conclusion.

In response to the NOIR, the Petitioner submitted a copy of the Beneficiary's MBA diploma. The Electronic Database of Global Education (EDGE), which federal courts have found to be a reliable,

peer-reviewed source of information about foreign educational equivalencies, states than an Indian MBA is comparable to a U.S. bachelor's degree in business administration.[2] The record therefore establishes the Beneficiary's possession of the minimum educational requirements of the offered position stated on the labor certification.

The Director found that the Beneficiary lacks a four-year bachelor's degree as specified on the labor certification. EDGE, however, reports that admission to an Indian MBA program requires at least a three-year bachelor's degree. The Beneficiary's MBA therefore reflects his completion of five years of university studies: three years of undergraduate and two years of graduate. Thus, the Beneficiary's MBA effectively equates to a five-year U.S. bachelor's degree. Because the labor certification requires a minimum of a four-year bachelor's degree, the Beneficiary's MBA exceeds the educational requirements of the offered position.

For the foregoing reasons, we will withdraw the Director's revocation of the petition's approval based on the Beneficiary's educational qualifications.

B. The *Bona Fides* of the Job Offer

A business may sponsor a foreign national if it is "desiring and intending to employ" him or her in 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 under the terms 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 domestic worker on a full-time, live-in basis under a labor certification's terms).

In this case, the labor certification states the Petitioner's intention to permanently employ the Beneficiary as a full-time sales and marketing manager. The job duties of the offered position include: overseeing 10 employees; preparing sales plans and projections; formulating pricing policies; coordinating sales and marketing activities; and handling customer grievances and inquiries.

At his USCIS interview for adjustment of status in 2015, the Beneficiary submitted an employment letter from another jewelry store operator. As the NOIR notes, the letter states the company's employment of the Beneficiary as a sales and marketing manager since April 2009. The Beneficiary's spouse signed the letter, which identified her as the "Member/Proprietor" of the

[2] EDGE was created by the American Association of College Registrars and Admissions Officers (AACRAO), "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." AACRAO, at http://www.aacrao.org/About-AACRAO.aspx (last visited Mar. 20, 2017); *see also, e.g., Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (describing EDGE as "a respected source of information").

limited liability company. The NOIR also quoted the company's website as stating that the couple "started the business 15 years ago."[3]

USCIS properly issued the NOIR regarding the *bona fides* of the job offer. If unexplained or unrebutted, the Beneficiary's co-founding of a business in the same trade as the offered position before the labor certification's filing would have cast significant doubt on the Petitioner's intention to permanently employ him. Rather, the record as of the NOIR's issuance suggested that the Beneficiary would not permanently work for the Petitioner, but for his own business.

In response to the NOIR, however, the Petitioner submitted IRS Forms W-2, Wage and Tax Statements, indicating its employment of the Beneficiary from 2003 to 2009. The Petitioner's employment of the Beneficiary for more than six years, from before the labor certification's filing until after the petition's approval, supports its intention to permanently employ him.

On appeal, the Petitioner also submits evidence indicating that the Beneficiary and his spouse did not start the other company 15 years ago. Rather, the company's articles of organization indicate that the Beneficiary's spouse, on her own, founded the entity in 2008, after the approvals of the labor certification and petition for the Beneficiary. In an affidavit, the Beneficiary states that the website of his spouse's company incorrectly indicated the business's founding 15 years ago.

> I meant . . . to state that I have 15 years' experience of this trade and sales & marketing, as I have also worked in sales & marketing in India as well. From a sales and marketing perspective, the customers would be more comfortable knowing that they are in experienced hands. I neither had intentions to defraud the government nor misrepresent any facts.

As of the petition's approval, the record does not indicate that the Petitioner knew that the Beneficiary's spouse would found a jewelry store at which the Beneficiary would work. A preponderance of the evidence therefore establishes the Petitioner's intention to employ the Beneficiary in the offered position.[4]

For the foregoing reasons, the record on appeal establishes the Petitioner's intention to employ the Beneficiary in the offered position. We will therefore withdraw the revocation on this ground.

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[3] The NOIR stated that USCIS last visited the company's website on April 8, 2016. When we accessed the website on March 20, 2017, however, it lacked information about the company and indicated that the site's domain was unowned.

[4] In revoking the petition's approval, the Director also cited a temporary decrease in the Petitioner's number of employees supervised by the offered position and a lack of evidence of the Beneficiary's intention to quit his position at his spouse's business. The drop in employees and the Beneficiary's employment by his spouse's business, however, occurred after the petition's approval. Thus, these facts would not have warranted the petition's denial at the time of its approval. *See Matter of Estime*, at 752. Therefore, the facts do not support revocation of the petition's approval.

C. 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, the labor certification states the proffered wage of the offered position of sales and marketing manager as $59,000 per year. The petition's priority date is October 22, 2004.

In determining ability to pay, we examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage each year, we examine whether it generated annual amounts of net income or net current assets sufficient to pay any differences between the annual proffered wage and actual wages paid. If net income and net current assets are insufficient, we may consider other factors affecting a petitioner's ability to pay. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[5]

As of the petition's approval on September 16, 2005, the record established the Petitioner's ability to pay. The Petitioner's federal income tax returns reflect sufficient net current assets to pay the proffered wage in 2004, the year of the petition's priority date. Because USCIS approved the petition before the end of 2005, evidence of the Petitioner's ability to pay that year was not yet available.

A NOIR, however, must allege facts that would have warranted a petition's denial as of its approval. *Matter of Estime*, 19 I&N Dec. at 751. Here, the record as of the petition's approval established the Petitioner's ability to pay the proffered wage. Moreover, the NOIR does not allege facts indicating the Petitioner's inability to pay. Therefore, USCIS did not properly issue the NOIR based on the Petitioner's ability to pay.

If preceded by a defective NOIR, a revocation cannot be sustained. *Id.* at 752. We will therefore withdraw the revocation of the petition's approval based on the Petitioner's purported inability to pay the proffered wage.

D. The Beneficiary's Qualifying Experience

As indicated above, we will withdraw all of the Director's grounds of revocation. But another potential revocation ground exists: the record as of the petition's approval did not establish the Beneficiary's possession of the minimum experience required for the offered position.

[5] Federal courts have upheld our 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rahman v. Chertoff*, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009).

Besides a bachelor's degree in business administration, the labor certification states that the offered position of sales and marketing manager requires six months of experience in the job offered. Experience in a job offered means experience performing the job duties listed on a labor certification. *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284, *2 (BALCA Oct. 24, 2011) (citations omitted).[6]

The Beneficiary attested to about eight months of qualifying experience in India. The Beneficiary stated that he worked for as a management trainee from May 2002 to February 2003.

As required, the Petitioner submitted a letter from indicating the company's employment of the Beneficiary as a management trainee from May 27, 2002, to February 5, 2003. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring a petitioner to support a Beneficiary's claimed qualifying experience with a letter from an employer). Contrary to the regulation, however, the letter does not describe the Beneficiary's experience with the company. The letter therefore does not establish the Beneficiary's possession of the required experience performing the duties of the offered position.

The Petitioner also submitted a letter from another purported former employer of the Beneficiary in India. The letter from states the company's employment of the Beneficiary from June 1997 to July 1998 and describes his duties.

The Beneficiary, however, did not list employment by as qualifying experience on the labor certification. The omission casts doubt on the purported experience. *See Matter of Leung*, 16 I&N Dec. 12, 14-15 (Distr. Dir. 1976), *disapp'd of on other grounds by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (finding a foreign national's testimony of qualifying experience to be "not credible" where he omitted the employment on the labor certification application on his behalf).

Moreover, the letter does not establish the Beneficiary's possession of experience in the job offered. Contrary to the job duties of the offered position specified on the labor certification, the letter does not state the Beneficiary's experience in overseeing, directing, and supervising employees, or in evaluating work schedules and assigning employee duties. The letter also does not indicate that the Beneficiary formulated pricing policies or handled customer grievances and inquiries as the job duties of the offered position state.

For the foregoing reasons, the record as of the petition's approval did not establish the Beneficiary's possession of the minimum experience required for the offered position. We will therefore remand this matter to the Director for further proceedings.

On remand, the Director should issue a new NOIR, informing the Petitioner of the insufficiency of its evidence regarding the Beneficiary's qualifying experience. The Director may also notify the

[6] Decisions of the Board of Alien Labor Certification Appeals (BALCA) do not bind us. However, they may constitute persuasive authority.

Petitioner of other potential grounds of revocation, including prior revocation grounds if supported by sufficient, additional evidence. The Director should also afford the Petitioner a reasonable opportunity to respond to all alleged revocation grounds. *See* 8 C.F.R. § 205.2(b) (stating the requirements of a NOIR). Upon review of any response by the Petitioner, the Director should then enter a new decision.

III. CONCLUSION

The record does not support the Director's grounds for revoking the petition's approval. However, the record does not contain sufficient evidence of the Beneficiary's qualifying experience for the offered position.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of S-H-*, ID# 400461 (AAO Apr. 21, 2017)