U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-R-S-

DATE: AUG. 1, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a private school operator, seeks to employ the Beneficiary as an elementary school teacher. It requests her classification under the third-preference, immigrant category as a professional. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. employer to sponsor a foreign national with a bachelor's degree for lawful permanent resident status.

After the filing's initial grant, the Acting Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that U.S. Citizenship and Immigration Services (USCIS) mistakenly approved the petition. The Director found that, as of the approval, the Petitioner did not establish its required ability to pay the proffered wage or the Beneficiary's qualifications for the offered position.

On appeal, the Petitioner submits additional evidence that it asserts establishes the petition's approvability. The Petitioner also contends that USCIS' "misconduct" in this matter should legally bar the petition's revocation.

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

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first 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 insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, an employer must next submit the certification to USCIS with an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the minimum requirements of a certified position and whether a petitioner can pay the proffered wage. If USCIS approves a petition, a foreign national may finally

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.

At any time before a foreign national obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, the erroneous nature of a petition's approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS properly issues a notice of intent to revoke (NOIR) if the unexplained and unrebutted record as of the NOIR's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, USCIS properly revokes a petition's approval if a petitioner's response to an NOIR does not explain or rebut the stated revocation grounds. *Id.* at 451-52.

II. THE REQUIRED EXPERIENCE

A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements by a petition's priority date.[1] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). To assess a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. 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 the "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 teacher as a bachelor's degree in English, liberal arts, or education, and two years of experience in the job offered. The Petitioner indicated on the certification that it would not accept experience in a related occupation.

On the labor certification, the Beneficiary attested that she gained about nine years of full-time, qualifying experience. She stated that, for the three years immediately preceding the petition's priority date, she worked for the Petitioner in the offered position.[2] The Beneficiary also stated that she taught at two middle schools in Iran from 1980 to 1986.

As of the petition's approval, the record contained a letter from one of the Iranian middle schools. The letter stated the school's employment of the Beneficiary as a teacher from 1980 to 1986 for 18

[1] This petition's priority date is December 28, 2004, 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).

[2] In response to the Director's NOIR, the Petitioner asserted the Beneficiary's qualifications for the offered position based on her experience with it. A labor certification employer, however, cannot rely on experience that a foreign national gained with it unless he or she obtained the experience in a position different than the offered one. *See Matter of Brent-Wood Prods., Inc.*, 88-INA-259, 1989 WL 250396 *2 (BALCA Feb. 28, 1989) (*en banc*). Here, the record indicates that the Beneficiary gained experience with the Petitioner in the offered position. The record therefore does not establish the Beneficiary's qualifications based on her experience with the Petitioner.

hours a week. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring a petitioner to support a beneficiary's claimed experience with letters from former employers). The part-time experience, if found to be credible, would equate to more than the requisite two years of full-time experience. The Beneficiary's 18 weekly hours represents 45 percent of a typical, full-time work week of 40 hours. Multiplying six years by 45 percent, her part-time experience equates to 2.7 years of full-time experience.

The record, however, did not establish the Beneficiary's claimed, qualifying experience. As the NOIR noted, contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the letter did not describe the Beneficiary's experience. Rather, the letter merely stated her position title ("mathematics teacher"), her weekly hours, and her dates of employment.

Also, the letter did not establish the Beneficiary's experience in the "Job Offered," as stated on the labor certification. Experience in a job offered means experience in the primary job duties of an offered position as listed on a certification application. *See, e.g., Matter of Eurotech Constr. Corp.*, 2005-INA-00107, 2007 WL 1720295 *2 (BALCA Feb. 20, 2007). Here, the primary job duties of the offered position include instructing students in "English, language arts and Islamic literature." But the letter from the Iranian school states the Beneficiary's employment as a "mathematics teacher." In addition, the record indicated that in Iran the Beneficiary taught middle-schoolers, while the offered position involves instructing "elementary" school students, from kindergarten through fourth grade ("K-4"). Thus, the record as of the petition's approval did not establish the Beneficiary's possession of the requisite experience in the job offered. The Director therefore properly issued the NOIR.

On appeal, the Petitioner submits additional letters from Iranian educators regarding the Beneficiary's employment at the two middle schools. Similar to the prior letter, one letter states the Beneficiary's employment at one school for 18 hours a week as a math teacher. The other letter states her work at the other school during the same period for 17 hours a week as both a math and English teacher.

The additional letters document the Beneficiary's employment at the second Iranian school. But they do not cure the evidentiary deficiencies regarding the Beneficiary's claimed, qualifying experience. Like the prior letter, the additional letters do not describe the Beneficiary's job duties as a teacher in Iran. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring an employment letter to provide "a description of . . . the experience of the alien").

Also, the additional documentation does not establish the Beneficiary's experience in the job offered. The letters indicate that, at one school, the Beneficiary taught only math, rather than English, language arts, and Islamic literature as the offered position requires. At the other school, the Beneficiary taught math and English. But the record does not indicate how much time she spent teaching English and therefore does not establish that her part-time English teaching equated to the requisite two years of full-time experience. Contrary to the requirements of the offered position, the record also does not document that she taught language arts and Islamic literature in Iran. The

record therefore does not establish the Beneficiary's possession of the requisite experience in the job offered.

For the forgoing reasons, the record as of the petition's approval did not establish the Beneficiary's qualifications for the offered position.

III. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must also 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.*

Here, the labor certification states the proffered wage of the offered position of teacher as $45,000 a year. As previously noted, the petition's priority date is December 28, 2004. The NOIR alleged that, as of the petition's approval in 2013, the record did not establish the Petitioner's ability to pay. Therefore, to determine whether the Director properly issued the NOIR on this ground, we must review the Petitioner's finances from 2004 through 2013.

In determining ability to pay, USCIS first examines whether a petitioner paid a beneficiary a full proffered wage each year from a petition's priority date. If a petitioner did not annually pay a full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any differences between the annual proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[3]

The Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, for the relevant period. The forms indicate that the Petitioner paid the Beneficiary the following amounts: $21,673.94 in 2004; $20,234.73 in 2005; $21,214.03 in 2006; $26,183.60 in 2007; $24,628.46 in 2008; $24,693.33 in 2009; $25,189.92 in 2010; $25,189.92 in 2011; $25,441.60 in 2012; and $25,944.96 in 2013. None of these amounts equaled or exceeded the proffered wage of $45,000. Based on the Petitioner's payments to the Beneficiary, the record therefore did not establish its ability to pay the proffered wage.

Nevertheless, we credit the Petitioner's payments. It need only establish its ability to pay the differences between the annual proffered wage and the wages paid, or: $23,326.06 in 2004;

[3] Federal courts have upheld USCIS' 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); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

$24,765.27 in 2005; $23,785.97 in 2006; $18,816.40 in 2007; $20,371.54 in 2008; $20,306.67 in 2009; $19,810.08 in 2010; $19,810.08 in 2011; $19,558.40 in 2012; and $19,055.04 in 2013.

As a non-profit organization, the Petitioner need not file federal income tax returns. Nevertheless, it submitted copies of IRS Forms 990, Returns of Organization Exempt from Income Tax, for the relevant period. The returns reflect the Petitioner's following amounts of surpluses and deficits: $43,814 in 2004; $320,727 in 2005; -$36,793 in 2006; -$157,391 in 2007; -$155,930 in 2008; - $16,244 in 2009; -$51,377 in 2010; $18,961 in 2011; $22,948 in 2012; and -$299,819 in 2013. The returns therefore indicate that the Petitioner had sufficient surpluses to pay the differences between the annual proffered wage and the wages paid in 2004, 2005, and 2012.

The NOIR noted that Form 990 lacks a specific space to list a net current asset amount. But the balance-sheet portion of the form sometimes allows computation of net current assets. Here, the Petitioner's returns reflect the following annual amounts of net current assets: $353,497 in 2006; $279,396 in 2007; $220,294 in 2008; $220,294 in 2009; $191,712 in 2010; $141,937 in 2011; and $237,381 in 2013. Thus, the returns indicate sufficient net current assets to pay the differences between the proffered wage and the wages paid in the remaining years.

As the NOIR indicated, however, the Petitioner filed immigrant petitions for other beneficiaries that were pending, approved, or submitted after this petition's priority date.[4] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here therefore had to demonstrate its ability to pay the combined proffered wages of this and its other petitions from this petition's priority date of December 28, 2004, until the other beneficiaries obtained lawful permanent residence. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries).

Although the NOIR asked the Petitioner to provide additional information about its other pending petitions in order to assess the Petitioner's full wage burden, it did not. The Petitioner asserts that its other petitions were "abandoned by the School or abandoned by the Beneficiaries." Unless the petitions were denied, withdrawn, or revoked, however, the Petitioner must demonstrate its ability to pay their proffered wages until their beneficiaries obtained lawful permanent residence. Absent the required information about these beneficiaries, we cannot determine that the Petitioner has the ability to pay the proffered wages to its multiple sponsored beneficiaries.

As previously indicated, in determining ability to pay, we may also consider circumstances beyond a petitioner's net income and net current assets. Under *Sonegawa*, we may consider such factors as: the number of years a petitioner has conducted business; its number of employees; the growth of its business; its reputation in its industry; its incurrence of uncharacteristic business losses or expenses;

[4] USCIS records identify two other immigrant petitions with the following receipt numbers: [redacted] and [redacted]

a beneficiary's replacement of a current employee or outsourced service; or other evidence of ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. However, without a full picture of the Petitioner's wage burden to its multiple I-140 beneficiaries, we cannot assess whether the totality of the Petitioner's circumstances would be sufficient to demonstrate its ability to pay.

IV. EQUITABLE ESTOPPEL

On appeal, the Petitioner asserts that USCIS engaged in "affirmative misconduct" that should equitably estop the petition's revocation. The Petitioner contends that USCIS "was fully aware or should have been fully aware" of the erroneous nature of the petition's approval. The Petitioner states that USCIS "purposely withheld or concealed from it the fact that [its] petition was erroneously approved for a significant period of time. USCIS has not communicated an error occurred, but rather is adjudicating the legality of the case again."

As previously discussed, USCIS may revoke a petition's approval based on the erroneous nature of its grant. *See* section 205 of the Act; *Matter of Ho*, 19 I&N Dec. at 590. Here, the record as of the petition's approval did not establish the Beneficiary's possession of the requisite experience in the job offered or the Petitioner's ability to pay the combined proffered wages of multiple petitions. The record indicates that, in approving the petition, USCIS did not notice these deficiencies. Based on the oversights, the Agency therefore properly sought revocation of the petition's approval.

Also, we have no authority to apply the judicially devised doctrine of equitable estoppel to preclude a USCIS component from undertaking a lawful course of action that it is empowered to pursue by statute and regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338-39 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. There is no delegation of authority, statute, regulation, or other law that permits us to apply this doctrine to the cases before us. *Id.*

V. CONCLUSION

As of the petition's approval, the record did not establish the Beneficiary's qualifications for the offered position or the Petitioner's ability to pay the proffered wage from the priority date onward. We will therefore affirm the petition's revocation.

ORDER: The appeal is dismissed.

Cite as *Matter of T-R-S-*, ID# 1108577 (AAO Aug. 1, 2018)