U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10183744

Date: AUG. 06, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner sought to employ the Beneficiary as an administrative assistant.[1] It requested classification of the Beneficiary as a skilled worker under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(B)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

After initially approving the petition, the Director of the Nebraska Service Center revoked the approval of the petition on multiple grounds. On appeal, we withdrew the Director's decision and remanded the matter to the Director to determine the Beneficiary's eligibility to participate in revocation proceedings as an affected party. The Director issued another notice of intent to revoke (NOIR) to the Beneficiary and subsequently revoked the approval the petition, concluding that the record did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. The matter is now before us on appeal.

In these proceedings, it is the affected party's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

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).[2] *See* section 212(a)(5) of the

[1] U.S. Citizenship and Immigration Services (USCIS) regulations do not generally allow a beneficiary to appeal a petition's revocation. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (stating that a beneficiary is not an "affected party" with legal standing in a proceeding). However, certain "portability-eligible" beneficiaries of revoked I-140 visa petitions are treated as affected parties in revocation proceedings. Section 204(j) of the Act, 8 U.S.C. § 1154(j). *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). Under the portability provision of section 204(j) of the Act, approved petitions may remain valid under certain conditions even after eligible beneficiaries change jobs or employers. A beneficiary of a valid visa petition, whose application for adjustment of status remains pending for at least 180 days, may "port" the petition to a new job if that job is in the same or similar occupational classification as the position offered in the petition. Here, the Beneficiary has indicated that he has ported to a new employer, [redacted]

[2] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is November 7, 2013. *See* 8 C.F.R. § 204.5(d).

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) 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 applies 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.

II. REVOCATION OF A PETITION'S APPROVAL

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Good and sufficient cause exists to issue a NOIR where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

III. THE BENEFICIARY'S EXPERIENCE

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires two years of experience in the job offered of administrative assistant. The job duties for the offered job listed at Part H.11 of the labor certification include performing routine clerical and administrative functions such as drafting correspondence, scheduling appointments, organizing and maintaining paper and electronic files, or providing information to callers. The labor certification does not permit qualifying experience in an alternate occupation.

The labor certification states that the Beneficiary worked full-time as a manager at [redacted] in [redacted] California, from December 17, 2004, to November 7, 2013. As detailed at Part K.9 of the labor certification, his duties as manager included buying tobacco products and accessories for retail resale to consumer; analyzing the company's past buying trends, sales records, and prices to determine maximum value and yield; continually researching potential wholesale sources to locate current optimum prices; and selecting, ordering, and authorizing payment for tobacco products to ensure adequate inventory with minimal waste due to staleness. None of the duties listed for the managerial position at Part K.9 correspond with the duties of the offered position listed at Part H.11. The Beneficiary did not list any other jobs on the labor certification.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3). The Beneficiary submitted a letter

dated July 31, 2015, in support of the petition confirming his self-employment as a manager at [redacted] from December 17, 2004, to the date of the letter. The letter did not list the address of the writer as required by 8 C.F.R. § 204.5(l)(3). In addition to listing the duties that were listed at Part K.9 of the labor certification, the letter stated that he supervised employees and handled all administrative duties and correspondence with vendors and customers.

In the NOIR, the Director noted several unresolved inconsistencies in the record regarding the Beneficiary's prior experience, including:

- With the Beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, filed on August 28, 2015, the Beneficiary submitted a Form G-325, Biographic Information form, signed by the Beneficiary on July 12, 2015, stating that he was employed as the owner/manager at [redacted] from July 2003 to the present; and a letter from the Petitioner dated July 22, 2015, stating that [redacted] will continue to employ [the Beneficiary] as an Administrative Assistant on a permanent, full-time, basis upon approval of his application for permanent residency."
- With the Beneficiary's Form I-485 filed on March 11, 2016, the Beneficiary submitted a Form G-325, signed by the Beneficiary on March 10, 2016, stating that he had not had any employment from March 2001 to the present; a letter from the Beneficiary's counsel stating that the employment listed on the prior G-325 was based on a typographical error and that a summer college student in his office inserted the employment information from the wife's form; a declaration from the Beneficiary dated November 31, 2016,[3] stating that he had been unemployed from October 14, 2001, until April 10, 2002, that he was an evangelist with [redacted] from April 11, 2002, to March 31, 2004, and that he had been unemployed from April 1, 2004, onward; and a Form G-325, signed by the Beneficiary on March 6, 2017, stating that he has not had any employment from March 2004 to the present.

In response to the NOIR, the Beneficiary's counsel stated that the Beneficiary worked as a manager at [redacted] from December 17, 2004, to November 7, 2013; that the Beneficiary was an "E-2 spouse working in a family business without receiving wages;" and that he mistakenly stated that he was unemployed during that time because he thought that "being 'employed' required payroll documentation, which he was not able to provide." In the Director's notice of revocation (NOR), the Director rejected counsel's explanation because the Beneficiary listed himself as employed on one Form G-325 and unemployed on another. He also noted that the Beneficiary provided no evidence in response to the NOIR to support counsel's claims. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). He further stated that the Beneficiary did not address other inconsistencies in the record, including the fact that on his declaration, the Beneficiary listed employment as an evangelist with [redacted] from April 11, 2002, to March 31, 2004, and that employment was not listed on any other documentation in the record.

Inconsistencies in the record must be resolved with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the proof provided may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa

[3] We note that November 31, 2016, is not an existing date on the calendar.

petition. *Id.* In the NOR, the Director determined that the Beneficiary did not submit independent, objective evidence of his qualifying employment and, thus, that the record did not establish that the Beneficiary met the experience requirements of the labor certification.

In the NOR, the Director also determined that the Beneficiary's purported experience as a manager does not meet the requirements of the labor certification, specifically, two years of experience in the job offered of administrative assistant. He noted that the Beneficiary's NOIR response asserted that the duties performed by the Beneficiary as a manager included many of the same duties as the offered position of administrative assistant and, therefore, that experience as a manager satisfies the requirements of the labor certification. The Director determined that the labor certification does not permit experience as manager to qualify for the offered job, and therefore, that the record did not establish that the Beneficiary met the experience requirements of the labor certification. In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements.[4] As previously noted, the labor certification requires two years of experience in the job offered of administrative assistant. It does not permit experience in an alternate occupation.

On appeal, the Beneficiary's counsel asserts that since he prepared the applications, he can "give evidence of mistakes and/or typographical errors made by counsel." He asserts that the errors regarding the Beneficiary's prior employment were the result of his errors.[5] However, counsel previously indicated that a summer college student made the errors on the Form G-325, not counsel himself. *See Matter of Ho*, 19 I&N Dec. at 591-92. Further, the Beneficiary signed the labor certification and Forms G-325, certifying under penalty of perjury that the information provided on the forms was true and correct.[6] The Beneficiary may not be absolved of his responsibility for the truthfulness of the information provided on the forms under these circumstances. *See Matter of A.J. Valdez and Z. Valdez*, 27 I&N Dec. 496 (BIA 2018).

The Beneficiary's counsel further asserts on appeal that the Beneficiary worked at his family business without being paid, and that administrative duties are performed by "low level managers and supervisors at small entities."[7] However, he does not provide independent, objective evidence of the Beneficiary's employment or duties at [redacted] *See Matter of Ho*, 19 I&N Dec. at 591-92. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2. As noted, the labor certification requires two years of experience as an administrative assistant and does not permit experience as manager to qualify for the offered job. None

[4] *See Madany v. Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

[5] The record does not contain evidence of a claim of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

[6] The Beneficiary's signature on the labor certification establishes a strong presumption that he knew the contents of the labor certification application and assented to them. *See Hanna v. Gonzales*, 128 F. App'x 478, 480 (6th Cir. 2005) (stating that "the law… charges [an applicant] with knowledge of the application's contents"); *see also, e.g., U.S. v. Baptist*, 759 F.3d 690, 696 (7th Cir. 2014) (holding that the failure to read a waiver form containing clear warnings of its consequences was insufficient to prove that the waiver was invalid, absent evidence that the signer was tricked or pressured into signing it).

[7] The Beneficiary may not make material changes in an effort to conform a petition to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

of the duties listed for the Beneficiary's managerial position at Part K.9 of the labor certification correspond with the qualifying duties of administrative assistant listed at Part H.11. Therefore, the record does not establish that the Beneficiary met the experience requirements of the labor certification.

Finally, as noted, the Beneficiary stated on his 2016 declaration that he was an evangelist with [redacted] from April 11, 2002, to March 31, 2004, yet on the Form G-325 signed by the Beneficiary on March 10, 2016, he stated that he had no employment from March 2004 onward. The Beneficiary's counsel stated on appeal that the Beneficiary's position at [redacted] did not involve administrative or management duties, but he did not resolve the inconsistencies in the record regarding that employment. *See Matter of Ho*, 19 I&N Dec. at 591-92.

Although counsel asserts on appeal that a "more detailed brief will be submitted within 30 days," we have not received a more detailed brief from the Beneficiary nearly eight months after the appeal was filed. It is the affected party's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). The affected party must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). It has not done so here.

In sum, as detailed above, the documents in the record relating to the Beneficiary's prior employment conflict with his experience listed on the labor certification, and the inconsistencies regarding the Beneficiary's experience have not been resolved with independent, objective evidence. Further, the Beneficiary's purported experience as a manager does not qualify him for the offered job of administrative assistant. The record does not establish that the Beneficiary has the experience required by the labor certification as of the priority date.

ORDER: The appeal is dismissed.