U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 10296703

Date: AUG. 06, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a Thai food specialty cook. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). 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 less than two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Beneficiary met the experience requirements of the labor certification.

In these proceedings, it is the Petitioner'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).[1] *See* section 212(a)(5) of the 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) 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is January 19, 2019. *See* 8 C.F.R. § 204.5(d).

## II. BENEFICIARY'S QUALIFICATIONS

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). The labor certification requires 12 months of experience in the offered job of Thai food specialty cook, and it states that the Beneficiary worked as a full-time (40 hours per week) Thai cook at [redacted] Restaurant in Thailand from July 1, 2010, to September 30, 2012.[2]

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). With the petition, the Petitioner submitted a letter dated October 1, 2012, from the owner of [redacted] Restaurant. The letter lists the Beneficiary's duties and states that the Beneficiary worked as a full-time Thai cook from July 1, 2010, to September 30, 2012. The letter is typed in English.

In a notice of intent to deny (NOID), the Director stated that the Beneficiary had indicated on a prior nonimmigrant student visa application submitted on October 2, 2012, that his current employment was "QA, freezing, packing and cold storage" at [redacted] The Beneficiary answered "no" to the question on the nonimmigrant visa application asking whether he had ever been previously employed. The consular notes from the visa record dated October 15, 2012, state "Works for low salary at food distributors for past year, before that worked as part-time researcher in environ sci (field he graduated univ from)." The Director noted that the information related to his nonimmigrant visa application contradicted the employment history on the labor certification and the experience letter submitted with the petition.

In response to the NOID, the Petitioner provided a letter, written in English, dated October 30, 2019, from the Beneficiary. He stated that he worked full-time (40 hours per week) on weekdays at [redacted] from March 1, 2012, to September 30, 2012, and that he also worked at [redacted] Restaurant full-time (40 hours per week) on nights and weekends as a Thai cook from July 1, 2010, to September 30, 2012. He stated that he also did research for a college professor in June 2010, but that the work was voluntary and he was not paid. He stated that he did not list his employment with [redacted] Restaurant on his nonimmigrant visa application because there was no space to list a "second concurrent job." He stated that the "consular officer never asked if I worked any place else."

In response to the NOID, the Petitioner also provided a letter, written in English, dated October 23, 2019, from [redacted] The letter states that she was a former manager at [redacted] Restaurant; that she used to work with the Beneficiary; and that the Beneficiary was employed at the restaurant as a Thai cook from July 2010 until September 2012. Further, in response to the NOID, the

[2] We note that the Beneficiary's ICE Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, in the record indicates that he requested post-completion optional practical training (OPT) employment authorization to work for the Petitioner from May 19, 2017, to May 18, 2018. However, the OPT employment is not reflected in any other documents in the record.

Petitioner provided a certificate dated September 30, 2012, written in English, from [redacted]. The certificate confirms the Beneficiary's employment in "production" from March 1, 2012, to September 30, 2012. Additionally, in response to the NOID, the Petitioner provided a letter, written in English, dated October 12, 2012, from [redacted] faculty member at [redacted] University in [redacted] Thailand. The letter states that the Beneficiary was [redacted]s senior project advisee and that he also hired the Beneficiary as a research assistant after he graduated from [redacted] University.

In his denial decision, the Director noted that several unresolved inconsistencies in the record remain regarding the Beneficiary's prior experience. Specifically, he stated that the consular officer's notes indicate the Beneficiary's prior employment and that it is not plausible that, "during a discussion about employment, the job with [redacted] Restaurant did not come up." He noted that the letter from [redacted] indicates that she worked with the Beneficiary for "many years" even though he was purportedly employed there for a little more than two years. He also questioned why the employment verification letter from [redacted] Restaurant was written in English. Further, he noted that the letter from [redacted] indicates that he "hired" the Beneficiary as a research assistant, indicating that the Beneficiary was employed whether he was paid or not. The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the Petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* The Director indicated that the Petitioner did not submit independent, objective evidence of the Beneficiary's qualifying employment and, thus, that the record did not establish that the Beneficiary met the experience requirements of the labor certification as of the priority date.

On appeal, the Petitioner does not submit independent, objective evidence of the Beneficiary's qualifying employment to resolve the inconsistencies in the record. Instead, it asserts that the Director's decision is "purely speculative" and that the Director can "easily" verify that there was no room for the Beneficiary to list his employment with [redacted] Restaurant on his nonimmigrant visa application. However, it is the Petitioner'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). On his nonimmigrant visa application, the Beneficiary listed his employment with [redacted] in the section for "present work/education/training," despite the fact that his work there had ended prior to his submission of the application. In the section on the application related to "previous work/education/training," he specifically answered "no" to the question inquiring whether he had been previously employed. If the Beneficiary had been employed with [redacted] Restaurant until September 30, 2012, there was room to list the details of his purported employment in that section. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Regarding his consular interview, the Petitioner states on appeal that "[s]ince being a cook is not related to his current job, it easy [*sic*] to see and understand why it wouldn't come up." However, the record does not indicate that the Beneficiary was employed on the date the nonimmigrant visa application was submitted on October 2, 2012, nor does it indicate that he employed on the date of the

consular interview less than two weeks later. It is not clear why he mentioned his job with [redacted]., but not his purported employment as a cook, when the two jobs were allegedly concurrent for several months and ended on the same day, September 30, 2012. A petitioner's unsupported statements are of limited weight and normally will be insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available. The Petitioner 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. We note that on his Form G-325, Biographic Information form, signed on September 30, 2019, the Beneficiary listed his last employment abroad as a Thai cook with [redacted] Restaurant from July 2010 to September 2012, but not his concurrent employment with [redacted] Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

Next, regarding [redacted]'s letter, the Petitioner states on appeal that English is her second language and that two years can be considered "many" for "someone whose native language is not English." It is not clear, then, why the letter was written in English when it is not her native language.[3] *Id.* Finally, regarding [redacted]'s letter indicating that he "hired" the Beneficiary as a research assistant, the Petitioner asserts on appeal that the term "employ" means to "give paid work" and, therefore, that the Beneficiary's omission of his prior work with [redacted] on the nonimmigrant visa application was correct because the Beneficiary was not paid. However, the application requested information regarding his previous "work/education/training," so even if he believed that the unpaid position as a research assistant with his college professor was not "work," it is not clear why it was not included as education and/or training in that section. *Id.*

In this case, the discrepancies catalogued above lead us to conclude that the evidence of the Beneficiary's eligibility is not credible. The Beneficiary's prior nonimmigrant visa application conflicts with the information provided on the labor certification and with the evidence submitted in this case. The Petitioner has not resolved the inconsistencies regarding the Beneficiary's purported experience with independent, objective evidence of his prior employment, such as paystubs, payroll records, personnel records, and/or tax records. Accordingly, the Petitioner has not established by a preponderance of the evidence that the Beneficiary possessed the experience required by the labor certification as of the priority date.

## III. ABILITY TO PAY THE PROFFERED WAGE

Although not addressed by the Director in his decision, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage from the priority date on January 19, 2019, and continuing until the beneficiary obtains lawful permanent residence.[4] The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

[3] The Petitioner did not specifically address the Director's concern as to why the employment verification letter from [redacted] Restaurant was written in English. Instead, on appeal, it states "the Director also appears to ignore the fact that you are dealing with people whose first language is not English."

[4] The annual proffered wage is $28,246.

Although the Petitioner submitted its 2018 federal tax return, the record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2019 onward. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

Additionally, where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner filed another Form I-140 petition for a different beneficiary. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[5] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of any other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

The Petitioner has not established its continuing ability to pay from the priority date onward. For this additional reason, the petition cannot be approved.

**ORDER:** The appeal is dismissed.

[5] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.