U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17141360

DATE: AUGUST 9, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, a commercial cleaning services business, seeks to employ the Beneficiary as a health, safety and sanitation engineer. It requests professional classification for the Beneficiary under the third preference immigrant category. 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" immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center initially approved the petition, but subsequently revoked the approval on multiple grounds.

On appeal the Petitioner submits a brief and additional documentation, and asserts that it has overcome the grounds for revocation. The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc*., 26 I&N Dec. 537, 537 n.2 (AAO 2015).

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision. In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

I. LAW

A. Employment-based Immigrant Petition Process

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *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)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition (Form I-140) 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 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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

B. Professional Classification

The regulation at 8 C.F.R. § 204.5(l)(2) defines "professional" as follows:

> *Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.

A petition for a professional must generally be accompanied by a valid, individual labor certification. *See* 8 C.F.R. § 204.5(l)(3)(i). The regulation states that to be eligible for professional classification the job offer portion of the labor certification must demonstrate that the job requires at minimum a baccalaureate degree. *Id.*

The regulations further provide that a petition for a professional must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree, that the alien is a member of the professions, and that the minimum of a baccalaureate degree is required for entry into the occupation. *See* 8 C.F.R. § 204.5(l)(3)(ii)(C).

II. ANALYSIS

The instant petition was filed on August 26, 2016, accompanied by a labor certification that was filed with the DOL on July 24, 2015, and certified in April 2016. In section H of the labor certification the job duties of the proffered position – health, safety and sanitation engineer (HSS engineer) – were listed as follows in box 11:

- Inspect and evaluate the environment, equipment, materials and processes in working areas to ensure compliance with government health, safety and sanitation regulations and industry standards.

- Maintain company's Injury and Illness Prevention Plan, OSHA, First Aid, CPR and other Safety, Health, and Sanitation related topics, and train staff on compliance with these programs.
- Review all Job Hazard Analysis.
- Coordinate with HR on workers compensation claims and provide opportunities for best care of injured employees for expediency of returning to work.
- Conduct investigation involving client's complaints on all incidents and near misses, in collaboration with the applicable and human resources.
- Ensure adherence to safety programs in order to provide a safe and clean workplace for employees within the regulations of all OSHA local and state regulations.
- Conduct random rounds at the client's facility to visually identify any personnel and/or health, safety, sanitation issues or concerns.
- Review and maintain all safety, health, sanitation training checklists and orientation materials related to each worker in the company. Assure all personnel complete required health, safety and sanitation training.

The education, training, and experience requirements for the job of HSS engineer were listed as follows in section H:

4.	Education: Minimum level required:	Bachelor's degree
4-B.	Major Field of Study:	Industrial Engineering or Environmental Engineering
5.	Is training required for the job?	No
6.	Is experience in the job offered required?	No
7.	Is an alternate field of study acceptable?	No
8.	Is an alternate combination of education and experience acceptable?	No
9.	Is a foreign educational equivalent acceptable?	Yes
10.	Is experience in an alternate occupation acceptable?	No
14.	Specific skills or other requirements:	

Bachelor['s] Degree or foreign equivalent degree in Industrial Engineering or Environmental Engineering.
Travel is required to visit client's facilities to conduct random rounds and observe workers performance.

Section J of the labor certification indicated that the Beneficiary's highest level of education relevant to the job opportunity was a bachelor's degree in environmental engineering from [redacted] University in [redacted] Poland, completed in 2002. As evidence of this educational credential the Petitioner submitted copies of the Beneficiary's transcripts with English translations, along with an academic evaluation by Silvergate Evaluations Inc. asserting that the Beneficiary's Polish degree was equivalent to a bachelor's degree in environmental and water resources engineering in the United States.

The petition was initially approved on September 2, 2016, and the record indicates that the Beneficiary began working in the proffered position of HSS engineer with the Petitioner on November 16, 2016.

In April 2020, however, the Director issued a notice of intent to revoke (NOIR) the approval. At the outset of the NOIR the Director stated that the issue is whether the Beneficiary "possesses the education and skills required to perform the intended job," due to "conflicting information regarding [her] degree as well as her ability to perform the job duties." The Director referred to the Beneficiary's I-485 (adjustment of status) interview and a site visit to the Petitioner's premises by USCIS which appeared to indicate that the Beneficiary was not performing HSS engineering work and that the job description and its requisite educational level had been misrepresented in the labor certification. In particular, the Director cited a document (dated January 14, 2019) submitted to USCIS by the Beneficiary following her I-485 interview which listed her current job duties with the Petitioner (as HSS engineer) and the percentage of time spent on each duty.[1] According to the Director, only 43.75% of the job duties were related to HSS engineering, while the others related to tasks she previously performed for the Petitioner as a part-time bookkeeper and cleaning supervisor. The Director stated that the Beneficiary, in her I-485 interview, displayed a lack of knowledge about specific duties she ostensibly performed as HSS engineer, acknowledged performing certain duties associated with her previous bookkeeping and supervisory positions, and indicated that her duties would not change in the future. In addition, the Director cited the Beneficiary's testimony in her I-485 interview that the engineering-related duties she took over when she became the HSS engineer used to be performed by the Petitioner's president, who has no engineering background. The Director also cited a separate interview of the Petitioner's president during the USCIS site visit which purportedly revealed that he was not well informed about the proffered position and elicited the admission that a bachelor's degree was not required for the job. Finally, the Director indicated that there were irregularities in the Beneficiary's university transcripts (unidentified in the NOIR) which called into question whether she had the requisite educational credential for a job as a professional engineer.

In response to the NOIR the Petitioner submitted two additional documents – including an English-language copy of the Beneficiary's diploma from the [redacted] University of Technology" and an email communication to the Beneficiary, in Polish with an English translation, from the Dean's Office, Faculty of Environmental & Energy Engineering, [redacted] University of Technology – in support of its claim that the Beneficiary earned a baccalaureate level diploma in the field of environmental engineering on October 8, 1992. With regard to the Beneficiary's job duties, the Petitioner submitted notarized statements from its president and the Beneficiary and discussed the January 2019 document which listed 10 duties the Beneficiary allegedly performed since starting work as HSS engineer in November 2016, the majority of which accorded with the job duties listed in the labor certification, but some of which did not. According to the Petitioner the Beneficiary was transitioning to HSS engineer in January 2019 and continuing to perform some duties from her previous position as first-line supervisor of office and administrative support workers. Most importantly, the Petitioner asserted that the Director mistakenly excluded a major duty of "traveling to serviced accounts," comprising 17.5% of the Beneficiary's work time, from her engineering-related duties. The Petitioner claimed, therefore, that well over 60% of the Beneficiary's time during the transitional phase of her employment

[1] This document also listed five previous part-time positions the Beneficiary held with the Petitioner from September 2011 to September 2016 as a bookkeeping, accounting and auditing clerk and as a first-line supervisor of office and administrative support workers, along with the duties performed in each job.

was spent performing engineering-related duties conforming to the job duties listed in the labor certification. While acknowledging that its president did not have an engineering degree, the Petitioner asserted that its president had over 35 years of experience in handling health, safety, and sanitation matters for his business, but now needed an employee with an engineering degree in view of the expanding business and higher regulatory standards.

In his decision revoking the petition's approval the Director first addressed the Beneficiary's 2019 document listing her job duties as HSS engineer. The Director reiterated the observation in the NOIR that only 43.75% of the Beneficiary's work time was related to job duties listed in the labor certification for the position of HSS engineer, while the other duties were unrelated to the proffered position and "conform most closely to those tasks she performed as a bookkeeper and first-line cleaning supervisor." The Director identified three specific duties in the 2019 document (comprising 50% of the Beneficiary's work time) as unrelated to the HSS engineering position, including:

- Contact with customers to ensure adherence to quality standards. Discuss job performance problems with employees to identify causes and issues [12.5%].
- Supervise the work of office and administrative worker[s]. Enter and send invoices and handle all financial transactions and record keeping [20%].
- Traveling to serviced accounts [17.5%].

The Director noted the Petitioner's claim that the Beneficiary was performing the above duties because she was transitioning from her previous job to the proffered position, but stated that no such claim was reflected in the job offer portion of the labor certification. The Director reiterated the observations in the NOIR that the Beneficiary, in her I-485 interview in January 2019, displayed a broad lack of knowledge regarding specific duties she ostensibly performed as HSS engineer, acknowledged performing certain duties unrelated to HSS engineering, and indicated that her duties would not change in the future. The Director also reiterated from the NOIR that the separate interview of the Petitioner's president revealed that he was not well informed about the proffered position and stated that a bachelor's degree was not required for the job. The Director concluded that the job the Beneficiary was currently performing does not require a bachelor's degree in industrial or environmental engineering, and that filing the labor certification and I-140 petition for an HSS engineer was a pretext for retaining the Beneficiary's services as a bookkeeper and first-line cleaning supervisor.

As for the Beneficiary's educational credential, the Director stated that "the transcript shows some inconsistencies." As an example the Director pointed out that classes are listed under two separate headings of "summer semester – academic year 1997/98," and indicated that the Petitioner had not submitted any new evidence in response to the NOIR to resolve this inconsistency. The Director did not address the English-language copy of the Beneficiary's diploma from [redacted] University of Technology or the email correspondence from the dean's office submitted in response to the NOIR. Nor did the Director identify any further inconsistencies in the transcript.

In summation, the Director stated that the Petitioner "failed to show that the [B]eneficiary has the ability to perform the job duties and did not resolve the inconsistencies in her school record."

On appeal the Petitioner asserts that the Director's revocation decision ignored the explanations provided in the notarized statements from the Beneficiary and the Petitioner's president submitted in response to the NOIR, as well as the additional evidence submitted in response to the NOIR. As an example, the Petitioner claims that the Director did not consider the statement of its president denying that he ever stated to USCIS officials that the proffered position does not require a bachelor's degree. As another example the Petitioner points out that the Director did not consider the Petitioner's claim that the job duty described as "traveling to serviced accounts," listed in the January 2019 document as comprising 17.5% of the Beneficiary's work time, was closely related to her work as an HSS engineer because the purpose of such travel to client sites was to identify personnel and/or health, safety, and sanitation concerns. The Petitioner also notes the documentation from [redacted] University of Technology submitted in response to the NOIR as evidence of the authenticity of the Beneficiary's degree, which the Director likewise neglected to address in the revocation decision. As further evidence of the Beneficiary's credential from that university the Petitioner submits a certificate from the *Politechniki* [redacted] dated February 4, 2021, certifying that the Beneficiary completed a study program in environmental engineering, specializing in water engineering and water resources management during the period of October 1, 1997, to October 8, 2002, and was awarded the professional title of *Inzynier* (engineer), equivalent to a bachelor of engineering. The certificate lists the Beneficiary's nine semesters of study and corrects the fourth semester by identifying the summer semester concluding the second year of study as "academic year 1998/1999, semester 4 completed on 12th Nov. 1999" (incorrectly identified as academic year 1997-1998 in the previously submitted transcripts).

After a thorough review of the record we conclude that the Director's decision was deficient in several respects and warrants a remand.

With regard to the Beneficiary's education, the Director did not address the two documents submitted in response to the NOIR as evidence that the Beneficiary earned a baccalaureate level degree in environmental engineering. Therefore, the Director's determination that the Petitioner "did not resolve the inconsistencies in [the Beneficiary's] school record" is incorrect insofar as the Director did not take all available evidence into account (which has now been supplemented by the additional document submitted in support of the appeal). Since the Director has not properly determined whether the Beneficiary earned a foreign degree equivalent to a U.S. baccalaureate degree in environmental engineering, the issue of whether the Beneficiary has the requisite credential to meet the minimum educational requirement of the labor certification and to qualify for professional classification is still open. On remand this issue must be decided based on all the evidence in the record.

The Director's analysis of the HSS engineer position based on the Beneficiary's listing of her job duties in the document dated January 14, 2019, is also problematical. As listed in the document, the Beneficiary's duties and the percentage of time spent on each were as follows:

- Inspect and evaluate the environment, equipment, materials and processes in working areas to ensure compliance with government health, safety and sanitation regulations and industry standards. (7.5%)

- Maintain company's Injury and Illness Prevention Plan, OSHA, First Aid, CPR and other Safety, Health and Sanitation related topics, and train staff on compliance with these programs. (6.25%)
- Review all Job Hazard Analysis. (5%)
- Ensure adherence to safety programs in order to provide a safe and clean workplace for employees within the regulations of all OSHA local and state regulations. (6.25%)
- Conduct random rounds at the client's facility to visually identify any personnel and/or health, safety, sanitation issues or concerns. (8.75%)
- Train or instruct employees in job duties and arrange for training to be provided. (6.25%)
- Review and maintain all safety, health, sanitation training checklists and orientation materials related to each worker in the company. Assure all personnel complete required health, safety and sanitation training. (10%)
- Contact with customers to ensure adherence to quality standards. Discuss job performance problems with employees to identify causes and issues and to work on resolving problems. (12.5%)
- Supervise the work of office and administrative worker[s]. Enter and send invoices and handle all financial transactions and recordkeeping. (20%)
- Traveling to serviced accounts. (17.5%)

According to the Director, the first five duties and the seventh, totaling 43.75% of the Beneficiary's work time, were the only ones "remotely related to her Labor Certification HHS Engineer position description," while the other four duties "are unrelated and conform most closely to those tasks she performed as a bookkeeper and first-line cleaning supervisor." This assessment of the other four job duties is correct with respect to the sixth and ninth duties listed in the January 2019 document, since "train or instruct employees in job duties and arrange for training to be provided" and "supervise the work of office and administrative workers" are specifically listed among the job duties performed by the Beneficiary in her previous position(s) with the Petitioner. However, the Director's assessment appears to be incorrect with respect to the tenth job duty listed in the January 2019 document – traveling to serviced accounts – since that duty is identified at section H.14 of the labor certification as an "other requirement" of the HSS engineer position ("to conduct random rounds and observe workers performance" at client facilities) and is not listed as a job duty in any of the Beneficiary's prior positions with the Petitioner. Adding the 17.5% of the Beneficiary's time spent on that duty would raise the total percentage of time spent on HSS engineer related duties to 61.25%. We are also not convinced that the Director's assessment with respect to the eighth job duty in the January 2019 document is correct, since "contact with customers to ensure adherence to quality standards" would appear to relate to the Beneficiary's HSS engineer duties.

The Director referred to the Beneficiary's I-485 interview in January 2019 as indicating that she lacked knowledge of specific items listed in her job duties relating to OSHA standards. and the preceding NOIR mentioned additional shortcomings in knowledge about the Petitioner's CPR program and its injury and illness prevention program. We note, however, that these three items are referenced exclusively in the second and fourth job duties listed in the Beneficiary's January 2019 document, which comprise *in toto* just 12.5% of her work time. In view of the Director's focus on the percentage of work time spent on the job duties listed for HSS engineer, little explanation was provided as to why

this particular area of responsibility, weighed against the other job duties, was so important in determining whether the Beneficiary is actually performing the duties of the HSS engineer position.[2]

The analytical shortcomings discussed above undermine the Director's determinations, stated on page 3 (top) of the revocation decision, that the Beneficiary "cannot perform the duties" of the HSS engineer position and that the position "does not require a Bachelor's Degree in Industrial Engineering or Environmental Engineering." On remand the Director may review and reconsider these issues taking our discussion in this decision and the record as a whole into account.

III. CONCLUSION

For the reasons discussed above we will remand this case to the Director, who may issue a new NOIR in accordance with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. Following the Petitioner's response to the NOIR, or the expiration of the time period for response, the Director shall issue a new decision.

ORDER: The Director's decision is withdrawn. The matter is remanded for further consideration and the entry of a new decision consistent with the foregoing analysis.

[2] The Beneficiary is not required to perform the duties of the proffered position in full before her I-485 application for legal permanent residence is approved, though the Petitioner must intend to employ the Beneficiary in the proffered position from the time the petition was filed. *See* 8 C.F.R. § 204.5(c).