U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-, INC.

DATE: AUG. 16, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a nail salon, sought to employ the Beneficiary as a manicurist and pedicurist. It requested her classification under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that, as of the approval, the Petitioner did not establish the Beneficiary's possession of the minimum experience required for the offered position and the requested classification.

On appeal, the Petitioner asserts that the Director disregarded evidence of the Beneficiary's qualifying experience and that the Beneficiary sufficiently explained her omission of the experience from a prior U.S. visa application.

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 certifies a position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *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 a requested immigrant classification. 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.

Before a beneficiary 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 may notify a petitioner of the Agency's intent to revoke a petition's approval if the unexplained and unrebutted record would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation lies if the record would have warranted denial after consideration of a petitioner's explanation or rebuttal evidence. *Id.* at 452.

II. THE MINIMUM EXPERIENCE REQUIRED

As previously indicated, a petition for a skilled worker must demonstrate that a beneficiary has at least two years of training or experience. 8 C.F.R. § 204.5(l)(3)(ii)(B). A petitioner must also establish a beneficiary's possession, by a petition's priority date, of all DOL-certified job requirements.[1] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

In evaluating a beneficiary's qualifications, USCIS must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of a 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 accompanying labor certification states the minimum requirements of the offered position of manicurist and pedicurist as a U.S. high school diploma or a foreign equivalent credential, and two years of experience in the offered position. The certification also states that the position requires a manicurist license in New Jersey.

On the labor certification, the Beneficiary attested that, before the petition's priority date, she gained more than three years of full-time experience in the offered position. She stated that she worked as a manicurist and pedicurist at a nail shop in South Korea from March 2004 through October 2007. The Petitioner submitted a letter from the purported former employer, confirming the Beneficiary's claimed dates of employment, job title, and duties. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring a petitioner to support a beneficiary's qualifying experience with a letter from a former employer).

The Director's notice of intent to revoke (NOIR), however, noted discrepancies between the Beneficiary's claimed experience and her statements on a December 2006 application for a U.S. visitor's visa. Asked on the visa application to identify her employer and telephone number at work, the Beneficiary answered "None" to both questions.

[1] This petition's priority date is May 8, 2009, 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).

The Director properly issued the NOIR. The Beneficiary's indication on the visa application of her unemployment in December 2006 would have warranted the petition's denial. The discrepancy cast significant doubt on the Beneficiary's claimed, continuous experience from March 2004 through October 2007, and thus on her qualifications for the offered position and the requested classification. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

In response to the NOIR, the Petitioner submitted affidavits from the Beneficiary, the president of her claimed former employer, and a purported former co-worker of hers. The statements confirm the Beneficiary's dates of employment, job title, and duties. The Petitioner also submitted copies of the former employer's purported attendance and payroll records for 2006 and 2007, indicating the business's employment of the Beneficiary and the coworker during those years.

The Beneficiary's affidavit states that a travel agent assisted her and her family in preparing and filing visitor visa applications in 2006. The agent reportedly told them that no proof of the Beneficiary's employment was needed because documentation of the employment and income of the Beneficiary's spouse established the intention of the entire family to return to South Korea after visiting the United States. *See* section 101(a)(15)(B) of the Act, 8 U.S.C. § 1101(a)(15)(B) (stating that visitors to the United States must have foreign residences that they have "no intention of abandoning"). The Beneficiary stated that the agent therefore "skipped" listing her work details on the application. The Beneficiary also attributed the application's omission of her claimed employment to her "misunderstanding and unfamiliarity" with the application form and the English language.

The Petitioner argues that the Beneficiary did not know of her employment's omission from the visa application. Her affidavit, however, does not clearly indicate whether she knew or not. The travel agent's purported discussion of the Beneficiary's employment with the family suggests that she knew of the omission. Also, by signing the application, she attested to her understanding of its questions and the truth and accuracy of her answers.

Moreover, regardless of whether the Beneficiary knew of her employment's omission, the record does not explain why she or the travel agent would have concealed her work. As additional evidence of the family's ties to South Korea, disclosure of the Beneficiary's employment would have further supported the visa applications. In her affidavit, the Beneficiary suggests that "the travel agent might have skipped my work history in order to simplify [the agency's] work in preparing our visa applications." But listing the Beneficiary's employer and its phone number on her application would have constituted little additional work. As previously discussed, the Beneficiary stated that the agent found no need to gather evidence of her employment.

Although the Petitioner submitted attendance and payroll records, the records document her employment only from January 2006 through October 2007, less than the requisite two years of qualifying experience. Also, the handwritten attendance and payroll records could have been created at any time. The record lacks additional, more reliable evidence, such as government or

contemporaneous business records, confirming: the former employer's business operations and location during the claimed employment period; the identities of the president and former coworker; and their positions with the former employer. The Petitioner has also not submitted, for example, records from the National Tax Service, the government agency that collects payroll taxes from South Korean employers, to demonstrate the Beneficiary's claimed qualifying experience.

The purported president of the nail salon stated that the business "disposed of" prior employment records because the South Korean government no longer required their retention. Even so, however, the Petitioner still must resolve the Beneficiary's inconsistent statements regarding her employment experience and establish her qualifications for the offered position. *See* section 291 of the Act, 8 U.S.C. § 1361 (stating that a petitioner bears the burden of proof)

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 and the requested classification.

III. ADDITIONAL ISSUES

Although unaddressed by the Director, the record as of the petition's approval also did not establish the Beneficiary's possession of the minimum education and licensure required for the offered position. As previously discussed, the labor certification states that, besides two years of experience in the job offered, the position of manicurist and pedicurist requires a U.S. high school diploma or a foreign equivalent credential, and a New Jersey manicurist license.

On the labor certification, the Beneficiary attested to her graduation from a senior high school in South Korea in 1979. The record, however, lacks evidence of her educational qualifications. The record also lacks evidence of her possession of a New Jersey manicurist license.

Thus, even if the Petitioner overcomes the Director's ground of revocation, the record would not establish the Beneficiary's eligibility for the offered position. The Petitioner must establish that, by the petition's priority date, the Beneficiary met the educational and licensure requirements of the offered position

In addition, public records indicate that another corporation conducts business at the Petitioner's address. *See* N.J. Div. of Revenues & Enter. Servs., Bus. Name Search, https://www.njportal.com/DOR/BusinessNameSearch/Search/BusinessName (last visited Aug. 10, 2018). The record therefore does not establish that the petitioning corporation remains in business. Termination of the Petitioner's business might have automatically revoked the petition's approval. *See* 8 C.F.R. § 205.1(a)(3)(iii)(D). In any future filings in this matter, the Petitioner must therefore demonstrate its continued business operations or document when those operations ceased.

IV. CONCLUSION

The record does not establish the Beneficiary's possession of the minimum experience required for the offered position and the requested classification. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of L-, Inc.*, ID# 1244666 (AAO Aug. 16, 2018)