U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-I-C-

DATE: AUG. 27, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a restaurant operator, seeks to employ the Beneficiary as a cook specializing in Indian cuisine. It requests his classification under the third-preference immigrant category as a skilled worker. *See* 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 for lawful permanent resident status to work in a job requiring at least two years of training or experience.

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval and denied the Petitioner's following motion to reconsider. The Director concluded that the Petitioner did not demonstrate: the Beneficiary's possession of the minimum experience required for the offered position; the company's required ability to pay the position's proffered wage; or the *bona fides* of the job opportunity.

On appeal, the Petitioner argues that the Director relied on "undisclosed and unsubstantiated" evidence regarding the Beneficiary's employment history, disregarded factors establishing the company's ability to pay, and erred in finding the job unavailable to U.S. workers.

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

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective 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 an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor 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 determines whether a beneficiary meets the requirements of a DOL-certified position and the requested immigrant classification. If USCIS

grants 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.

"[A]t any time" 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 justifies its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS may issue a notice of intent to revoke (NOIR) 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). The Agency may revoke a petition if an NOIR response does not overcome 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] When evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.3d 1008, 1015 (D.C. Cir. 1983) (holding that "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 Indian food cook as two years of experience in the job offered. The labor certification indicates that the position does not require any education or training. The Petitioner also indicated that it would not accept experience in a related occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than two years of full-time, qualifying experience in India. He stated that he worked as a cook in a hotel from March 1998 through September 2000. Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner submitted a letter from the Beneficiary's former employer in support of the Beneficiary's claimed, qualifying experience.

The Director's NOIR, however, noted that, contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the letter lacked the name of its signatory. Because the letter did not comply with regulations, it did not establish the Beneficiary's claimed, qualifying experience. The Director therefore properly issued the NOIR on this ground.

The NOIR also alleged inconsistencies in the Beneficiary's claimed employment history. The notice stated that, although the Beneficiary's 2008 immigrant visa application requested information about

[1] This petition's priority date is August 1, 2002, the date an office in DOL's employment service system 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).

his employment during the prior 10 years, the application omitted his claimed, qualifying experience at the hotel from 1998 to 2000. The application reportedly stated that the Beneficiary worked "odd jobs" from February 2001 to July 2003 in a city more than 1,000 miles from his claimed residence in India. The NOIR also stated that, at an interview with a U.S. consular officer in India, the Beneficiary "was unable to answer questions regarding his claimed experience as a specialized cook." Also, all six people contacted by U.S. officials from the Beneficiary's village reportedly did not identify him as a cook, but rather stated that he primarily operated a general store from his home.

In response to the NOIR, the Petitioner submitted another letter from the hotel, this one identifying its signatory in compliance with 8 C.F.R. § 204.5(l)(3)(ii)(A). The Petitioner, however, has not explained why the Beneficiary omitted his claimed, qualifying experience from his immigrant visa application. *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). The record therefore requires additional, independent, objective evidence - such as tax or contemporaneous business records - to corroborate the Beneficiary's purported experience.

On appeal, the Petitioner argues that USCIS did not provide it with a meaningful opportunity to respond to the derogatory evidence from the consulate. The company notes that USCIS neither detailed the questions asked of the Beneficiary at the consulate, nor identified the villagers that consular officials contacted. The Petitioner also asserts that USCIS did not provide the bases of the villagers' knowledge.

Department of Homeland Security regulations, however, only require USCIS to "advise" a petitioner of derogatory information forming the basis of an adverse decision and to provide the petitioner "an opportunity to rebut the information . . . before the decision is rendered." 8 C.F.R. § 103.2(b)(16)(i). Here, the NOIR adequately summarized the Beneficiary's consular interview regarding his claimed, qualifying experience in India and afforded the Petitioner an opportunity to explain the Beneficiary's responses and provide additional evidence of his experience. *See Hassan v. Chertoff*, 593 F.3d 785, 787 (9th Cir. 2010) (holding that applicants or petitioners need only "be aware" of the information against them and have opportunities to explain and rebut the information). Although aware that the Beneficiary did not convince consular officials of his claimed, qualifying experience, the Petitioner chose not to provide his version of the interview, an explanation of his responses, or independent evidence to corroborate his claims. *See* section 291 of the Act, 8 U.S.C. § 1361 (stating that a petitioner bears the burden of establishing eligibility for a requested benefit). Records that public officials make in the ordinary courses of their duties, generally evince "strong indicia of reliability." *Felzcerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996). The Petitioner has not demonstrated that the consulate's report is unreliable. The NOIR also sufficiently indicated that the villagers based their statements on their residence near the Beneficiary and their observations of the purported store in his home.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the petition's revocation on this ground.

III. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must also demonstrate its continuing ability to pay a position's 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 generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the 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 fund any difference 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. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

Here, the labor certification states the proffered wage of the offered position of Indian food cook as $10 an hour, or $20,800 a year based on a 40-hour work week. As previously noted, the petition's priority date is August 1, 2002. USCIS approved the petition in September 2007. The Petitioner therefore had to demonstrate its ability to pay the proffered wage from 2002 to 2007.

The record supports the NOIR's allegation that the Petitioner did not demonstrate its ability to pay the proffered wage in 2005. The Petitioner did not submit evidence that it paid the Beneficiary wages that year. Also, a copy of its federal income tax return for 2005 reflects net income and net current assets below the annual proffered wage of $20,800.

The record also supports the NOIR's allegation that, after this petition's priority date and before its approval, the Petitioner had multiple petitions that were pending or approved. 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 must therefore demonstrate its ability to pay the combined proffered wages of this and any other petitions that were pending or approved as of August 1, 2002, or filed thereafter, until this petition's approval on September 20, 2007. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming revocation of a petition's approval where, as of the grant, a petitioner did not demonstrate its ability to pay combined proffered wages of multiple petitions).

USCIS records show that, on the same day the Petitioner filed this petition, it filed another that remained pending as of this petition's priority date and was ultimately approved.[3] The Petitioner must therefore demonstrate its ability to pay the combined proffered wages of both petitions, from the priority date of this or the other petition (whichever is later) through 2007. Contrary to the NOIR's request, however, the Petitioner did not provide the proffered wage of the other petition. Thus, we are unable to calculate the total wage obligation for the time period in question, and the

[2] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Four Holes Land & Cattle, LLC v Rodriguez*, No. 5:15-cv-03858, 2016 WL 4708715 *4 (D.S.C. Sept. 9, 2016).

[3] USCIS records identify the other petition by receipt number [redacted]

record does not establish the Petitioner's continuous ability to pay the proffered wage from the petition's priority date onward.

In its NOIR response, the Petitioner stated that the other petition's beneficiary "became a permanent resident in 2012 and is no longer with the company." Nevertheless, because the other beneficiary was not granted legal permanent resident status prior to this petition's approval in 2007, the Petitioner had to demonstrate its ability to pay the combined proffered wages of this and the other petition. As of this petition's approval, the record therefore did not establish the Petitioner's continuing ability to pay the relevant proffered wages from the petition's priority date onward.

On appeal, the Petitioner asserts that the Director disregarded evidence of its ability to pay under *Sonegawa*. As previously indicated, when determining a petitioner's ability to pay, we may consider factors other than its wages paid, net income, and net current assets. We may consider: the number of years it has conducted business; its number of employees; growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; a beneficiary's replacement of a current employer or outsourced service; or other factors affecting a petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 2002 and its employment of five people. Copies of tax returns also indicate that the Petitioner's gross annual revenues grew from 2002 to 2007. Unlike the petitioner in *Sonegawa*, however, the Petitioner here did not demonstrate its possession of an outstanding reputation in its industry. Also, the record does not indicate that the Beneficiary will replace an employee or outsourced service. In addition, unlike the petitioner in *Sonegawa*, the Petitioner must demonstrate its ability to pay the combined proffered wages of multiple petitions. A totality of the circumstances under *Sonegawa* therefore does not establish the Petitioner's ability to pay the proffered wage.

For the foregoing reasons, the record as of the petition's approval did not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore also affirm the petition's revocation on this ground.

IV. THE BONA FIDES OF THE JOB OPPORTUNITY

The determinations above resolve the appeal. We will therefore not address the Director's finding that the Petitioner did not establish the availability of the offered position to U.S. workers. We reserve this issue for any future proceedings in this matter.

V. CONCLUSION

The record does not establish the Beneficiary's possession of the minimum experience required for the offered position or the Petitioner's ability to pay the proffered wage. We will affirm the revocation of the petition's approval for these reasons, with each considered an independent and alternate ground of revocation. As in petition proceedings, a petitioner in revocation proceedings bears the burden of establishing eligibility for the requested benefit. *Matter of Ho*, 19 I&N Dec. at 589. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of M-I-C-*, ID# 5236841 (AAO Aug. 27, 2019)