U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6985727

Date: DEC. 2, 2019

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as an electrician. The company requests his classification under the third-preference, immigrant category for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Texas Service Center denied the petition and dismissed the Petitioner's following motion to reopen. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. 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. *Id.* DOL also considers whether employment of a foreign national will 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 a requested visa 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.

II. THE REQUIRED EXPERIENCE

A petitioner must demonstrate that a beneficiary met all DOL-certified job requirements of an offered position by a petition's priority date.[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 a position's minimum job requirements. 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 "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 electrician as two years of experience in the job offered. The labor certification states that the position does not require any training or education.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained about 17 years of full-time experience in the offered position of electrician. He stated that a U.S. electrical contractor employed him for about seven years, from May 2010 through the filing of the labor certification application. He also stated that he worked for an electrical equipment company in Kazakhstan for about 10 years, from July 1986 to April 1996.

To demonstrate qualifying experience, a petitioner must provide letters from former employers of a beneficiary. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must contain the names, addresses, and titles of the employers, and describe a beneficiary's experience. *Id.*

The Petitioner initially submitted a copy of the Beneficiary's union membership card. The card identifies his former U.S. employer and his position as an electrician. Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), however, the union card does not: constitute a letter; contain the address or title of the Beneficiary's former employer; or sufficiently describe the Beneficiary's experience. The card therefore does not demonstrate his claimed qualifying experience.

In response to the Director's written request for additional evidence (RFE), the Petitioner submitted a letter from the office administrator of the Beneficiary's former U.S. employer. The letter states the company's employment of the Beneficiary from December 2012 to December 2018. Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), however, the letter does not describe the Beneficiary's experience. Also, the letter states that the Beneficiary began employment in December 2012, not May 2010 as listed on the labor certification. The discrepancy in the Beneficiary's start date of employment casts doubt on his claimed experience. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

The Petitioner's motion to reopen included a second letter from the office administrator of the Beneficiary's former U.S. employer. This letter reiterates the Beneficiary's start date of December

[1] This petition's priority date is October 30, 2017, the date 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).

2012, but includes a description of his job duties. The letter, however, states the Beneficiary's duties exactly as the labor certification lists the duties of the offered position. The letter even repeats a typographical error on the labor certification, stating the Beneficiary's "uae" of hand and power tools, rather than his "use" of them. The identical job duties on the letter and labor certification cast further doubt on the Beneficiary's claimed experience. The identical duties suggest that the office administrator copied the tasks of the offered position from the labor certification onto the letter, rather than describing the Beneficiary's former duties based on the administrator's personal knowledge or company records. Also, the former employer's most recent letter is dated before its initially submitted letter and before the date of the Director's RFE. The record does not explain why the former employer issued a letter before the RFE, or why the Petitioner submitted the former employer's most recent letter first. The dates of the letters and their submissions cast doubt on their authenticity. *See Matter of Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any aspect of a petition's proof may lead to the reevaluation of the reliability and sufficiency of remaining evidence).

On appeal, the Petitioner submits additional evidence of the Beneficiary's work for his claimed former U.S. employer. In an affidavit, the Beneficiary states that the employer's letters correctly state his employment start date as December 2012 and that he mistakenly told counsel that he began work there in May 2010. Other evidence, however, does not sufficiently corroborate the Beneficiary's claim. The Petitioner submits copies of payroll records and IRS Forms W-2, Wage and Tax Statements, indicating the U.S. company's employment of the Beneficiary in 2012, 2013, 2017, and 2018. The payroll records and Forms W-2, however, identify the Beneficiary by a different U.S. Social Security number than listed for him on the petition. The discrepancy in the Beneficiary's Social Security number casts additional doubt on his claimed experience.

Also, the payroll records indicate that, in September and October of 2018, the Beneficiary worked on a part-time basis. The payroll records therefore conflict with the Beneficiary's attestation on the labor certification that he worked full-time for his former U.S. employer. The Petitioner also submits copies of safety certificates and photographs of the Beneficiary. These materials indicate the Beneficiary's work as an electrician, but they do not establish his employment by his claimed former employer. In addition, the record contains a copy of the Beneficiary's resume, indicating that he worked as an electrician for other U.S. companies from 2012 to 2015, in 2015, and from 2016 to 2017. The record does not explain how the Beneficiary worked full-time for his claimed former U.S. employer from 2012 to 2018 while also working for the other companies listed on his resume.

The record also does not establish the Beneficiary's claimed qualifying experience in Kazakhstan. The Petitioner's RFE response included a copy of the Beneficiary's government-issued work card from the former Soviet Union. Largely consistent with the Beneficiary's attestation on the labor certification, the card indicates that he worked for an electronics equipment company in Kazakhstan from 1985 to 1996. Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), however, the work card does not sufficiently describe his experience. In his affidavit, the Beneficiary states that he could not obtain a letter from his former Kazakhstani employer because it ceased operations and dissolved. On a labor certification application filed for him by another prospective employer in 2008, however, the Beneficiary stated that the Kazakhstani company employed him not from 1985 to 1996, but from November 2004 to November 2006. Another petition for him also included a purported 2009 letter from the Kazakhstani company confirming his employment from 2004 to 2006. In addition, this

petition states that the Beneficiary last entered the United States in 2000. The record does not explain how he could have worked in Kazakhstan from 2004 to 2006 while residing in the United States. These discrepancies cast significant doubt on the Beneficiary's claimed qualifying experience in Kazakhstan. *See Matter of Ho*, 19 I&N Dec, at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies)

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

III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also does not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). For petitioners with less than 100 employees, as in this case, evidence of ability to pay must 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 the full proffered wage, USCIS alternatively considers whether it generated annual amounts of net income or net current assets sufficient to pay any difference between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider additional factors affecting a petition's ability to pay a proffered wage. *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 electrician as $76,669 a year. As previously noted, the petition's priority date is October 30, 2017.

The Petitioner submitted a copy of its federal income tax return for 2017, reflecting sufficient net current assets to pay the proffered wage. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks required evidence of the Petitioner's ability to pay beyond 2017. Thus, in any future filings in this matter, the Petitioner must submit copies of annual reports, federal income tax returns, or audited financial statements for 2018 and, if available, 2019. The Petitioner may also submit additional evidence of its ability to pay, including proof of any wages it paid to the Beneficiary or materials supporting the factors stated in *Sonegawa*.

[2] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

IV. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.