U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-C-A-R-

DATE: DEC. 4, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of construction services, seeks to employ the Beneficiary as an administrative assistant. It requests 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 for lawful permanent resident status to work in a job requiring at least two years of training or experience.

After first granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that, as of approval, the Petitioner did not demonstrate the Beneficiary's possession of the minimum experience required for the offered position.

On appeal, the Petitioner asserts that the Director disregarded evidence of the Beneficiary's experience and that her educational credentials also qualify her for the position.

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, 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 the DOL approves an offered position, an employer must next submit a 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 DOL-certified, job requirements of a position. 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.

At any time before a beneficiary obtains lawful permanent resident status, 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 issue a notice of intent to revoke (NOIR) if the unrebutted and unexplained record, as of the NOIR's issuance, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, USCIS may revoke a petition's approval if a petitioner's response does not overcome the grounds stated in an NOIR. *Id.* at 452.

II. EXPERIENCE REQUIRED FOR THE OFFERED POSITION

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered position 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] In 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.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 labor certification states the minimum requirements of the offered position of administrative assistant as a U.S. high school diploma or an equivalent foreign credential, plus two years of experience "in the job offered." The labor certification states that the Petitioner will not accept experience in an alternate occupation. The Beneficiary's educational qualifications are not at issue.

On the labor certification, the Beneficiary attested that, by the petition's priority date, she gained more than two years of qualifying experience. She stated that she worked as an administrative assistant for a construction business in Poland from March 2002 to June 2004.

Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner submitted a letter from the owner of the claimed former employer in support of the Beneficiary's experience. The letter stated her employment in the Polish business's "office/administrative division" from March 2002 to June 2004 and listed her job duties. The Director's NOIR, however, informed the Petitioner that the business's owner told a U.S. Department of State (DOS) official in Poland that the Beneficiary is his niece and that she "never officially worked for him."

The Director issued the NOIR for "good and sufficient cause." The owner's statement to the DOS official cast doubt on the Beneficiary's claimed employment. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies by independent, objective evidence pointing to

[1] This petition's priority date is May 14, 2014, 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).

where the truth lies). Also, the owner's stated family relationship with the Beneficiary suggests his prejudice on her behalf, reducing the letter's reliability.

In its NOIR response, the Petitioner submitted an updated, written statement from the owner of the Polish business. The statement confirms the business's employment of the Beneficiary as detailed in the prior letter. But the owner stated that he told the DOS official that the Beneficiary worked for the business without compensation. He described her position as "an internship, practically applying knowledge gained at the University." The owner stated that, during the Beneficiary's period of full-time work, she studied administration at a university on weekends. The owner did not address his relationship to the Beneficiary. But the Petitioner's appellate brief describes him as her "uncle."

As the Petitioner argues, unpaid work may constitute qualifying experience. *See, e.g., Matter of B&B Residential Facility*, 2001-INA-00146, 2002 WL 1586297 *3 (BALCA July 16, 2002).[2] Here, the Petitioner asserts that the Director disregarded the owner's written statement confirming the Beneficiary's claimed experience. Contrary to the Petitioner's assertion, however, the owner's apparent family relationship to the Beneficiary casts doubt on the statement's reliability. Also, the labor certification identifies his business's address as his apartment. Combined with his family relationship to the Beneficiary, the residential nature of the address casts doubt on the business's existence. The record lacks independent, objective evidence of the business's operations and the Beneficiary's full-time work for it during the claimed period.

In addition, the record does not establish the Beneficiary's possession of experience "in the job offered." The labor certification specifies that the Petitioner will not accept experience in a related occupation. Experience "in the job offered" means experience "performing the key duties of the job opportunity." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284 *2 (BALCA Oct. 24, 2011) (citation omitted). Consistent with the job duties of the offered position, the owner's letter indicates that the Beneficiary "coordinate[d] office services." But the letter does not state her performance of most of the job duties of the offered position. Omitted job duties include: "personnel & records control;" "conducting research;" "preparing statistical reports;" "handling info requests;" "scheduling meetings;" "creat[ing] new systems/revis[ing] established procedures;" and "review[ing] & answer[ing] correspondence." The record therefore does not establish the Beneficiary's experience "in the job offered."

Even if the Beneficiary lacks the requisite experience, the Petitioner argues that we should consider her educational credentials. The Petitioner submitted evidence that, by the petition's priority date, the Beneficiary earned a Polish master's degree in administration. The Petitioner notes that, for purposes of skilled-worker classification, "[r]elevant post-secondary education may be considered as training." 8 C.F.R. § 204.5(l)(2) (defining the term "skilled worker").

[2] While we are not bound by BALCA decisions, we may nevertheless take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

The Beneficiary's qualifications for the requested classification of skilled worker, however, are not at issue. Rather, the Director found the record insufficient to establish her qualifications for the offered position described on the labor certification. The position requires two years of experience in the job offered and does not allow the minimum requirements to be met with training or post-secondary education. Thus, contrary to the Petitioner's argument, the Beneficiary's university education cannot satisfy the experience requirements of the offered position.

III. 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 Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of S-C-A-R-*, ID# 1940178 (AAO Dec. 4, 2018)