U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12014324

Date: DEC. 15, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, an operator of a convenience store/gas station, seeks to employ the Beneficiary as a manager. The business requests his classification under the third-preference, immigrant visa 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).

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that the Petitioner willfully concealed a family relationship and found discrepancies in the Beneficiary's claimed start date of employment with the company.

In revocation proceedings, the Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. See Matter of Ho, 19 I&N Dec. 582, 589 (BIA 1988) (discussing the burden of proof); see also Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: 1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and 2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved 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 noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a designated noncitizen beneficiary 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.

"[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 a record, the erroneous nature of a petition's approval justifies its revocation. Matter of Ho, 19 I&N Dec. at 590.

USCIS issues a notice of intent to revoke (NOIR) a petition if the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the filing's denial. Matter of Estime, 19 I&N Dec. 450, 451 (BIA 1987). USCIS properly revokes a petition's approval if a petitioner's NOIR response doesn't overcome stated revocation grounds. Id. at 451-52.

II. THE BENEFICIARY'S START DATE WITH THE PETITIONER

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 "DOL bears the authority for setting the content of the labor certification") (emphasis in original).

The accompanying labor certification states the minimum requirements of the offered position of manager as a U.S. associate degree, or a foreign equivalent degree, in business, economics, or a related field, plus two years of experience "in the job offered."

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than four years of full-time, qualifying experience as a general manager in India. He stated that an import/export business employed him from January 1995 to March 1997 and that, from March 1997 to February 1999, he worked for a chemical company.

The Director's NOIR notes discrepancies in the Beneficiary's start dates of employment with the Petitioner. As of its filing in August 2006, the labor certification application didn't state the Petitioner's employment of the Beneficiary. But his Form G-325A, Biographic Information, which he filed with his application for adjustment of status in August 2007, states that he began working for the Petitioner in February 2006. Further, his Form I-485 Supplement J, Confirmation of Bona Fide Job Offer - filed in September 2017 - identifies his start date of employment with the Petitioner as October 2007.

The above discrepancies cast doubt on the Beneficiary's true, start date of employment with the Petitioner. But the business didn't rely on its employment of the Beneficiary to establish his qualifying experience for the offered position. Rather, the Petitioner submitted evidence of the Beneficiary's claimed, prior employment experience in India. Thus, the discrepancies in the Beneficiary's start date with the Petitioner don't materially affect his eligibility for the offered position.

[1] This petition's priority date is August 10, 2006, the date DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The discrepancies regarding the Beneficiary's start date of employment with the Petitioner wouldn't have warranted the petition's denial. See Matter of Estime, 19 I&N Dec. at 451. We will therefore withdraw revocation of the petition's approval on this ground.

The Director also found that, on the labor certification, the Petitioner willfully concealed a family relationship. We will also withdraw this portion of the Director's decision.

III. THE BENEFICIARY'S QUALIFICATIONS

The record as currently constituted doesn't support the Director's revocation of the petition's approval. Nonetheless, USCIS appears to have erred in approving the petition. Specifically, the record at the time of the NOIR's issuance didn't establish the Beneficiary's qualifications for the offered position.

As previously discussed, the labor certification states the minimum requirements of the offered position of manager as a U.S. associate degree, or a foreign equivalent degree, in business, economics, or a related field, plus two years of experience in the job offered. The Beneficiary attested that he gained more than four years of full-time, qualifying experience in India, where he worked for two former employers as a general manager.

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

The Petitioner submitted letters from the Beneficiary's claimed, former employers stating his employment consistent with his attestations on the labor certification. But - except for the stationery, employment dates, and names and titles of the signatories - the letters are identical. The similarities suggest that the letters' signatories didn't draft the documents based on company records or the signatories' personal knowledge of the Beneficiary's employment. The similarities therefore cast doubt on the letters' accuracy and authenticity. The differing industries of the former employers - import/export v. chemicals - cast additional doubts on the identical job duties stated in the letters.[2]

Also, the record didn't establish the qualifying nature of the Beneficiary's claimed experience. As previously discussed, the labor certification states that the offered position requires experience "in the job offered." The Petitioner indicated that it won't accept experience in an alternate occupation. Experience in the job offered means "experience performing the key duties of the job opportunity" as listed on a labor certification. Matter of Symbioun Techs., Inc., 2010-PER-01422, slip op. at *3 (BALCA Oct. 24, 2011) (citations omitted). The Petitioner's labor certification describes the key duties of the offered position as:

> Manag[ing] all day-to-day business operations. Duties include maintaining financial accounts, books, and records; managing payroll, accounts payable and receivable, and operating budgets; overseeing employees, including hiring, evaluating, training, and

[2] The Director's NOIR also notes the similarities between the letters. But the revocation decision doesn't link these likenesses to a revocation ground. See 8 C.F.R. § 205.2(c) (requiring a revocation notice to "explain[] the specific reasons for the revocation").

> scheduling; managing all vendor/supplier transactions including account payment process; preparing all franchise paperwork; and establishing controls to guard against theft and wastage.

The letters from the Beneficiary's purported, former employers state that "[h]e was in charge of Purchase, Sales, Accounting, Staff and Quality control." But the letters don't further detail his experience. Thus, contrary to the job duties of the offered position, the letters don't specify that he: maintained "financial accounts, books, and records;" managed "payroll, accounts payable and receivable, and operating budgets;" hired, evaluated, trained, and scheduled employees; prepared "franchise paperwork;" or established "controls to guard against theft and wastage." Therefore, at the time of the NOIR's issuance, the record didn't establish the Beneficiary's qualifying experience "in the job offered."

In addition, the record didn't demonstrate the Beneficiary's possession of the minimum educational requirements of the offered position. On the labor certification, the Beneficiary attested that, in 1999, an Indian university awarded him a bachelor's degree in "economics and history." Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(B), however, the Petitioner neither submitted corroborating evidence of the Beneficiary's claimed, foreign degree such as a final diploma and statement of marks, nor demonstrated the degree's equivalency to at least a U.S. associate degree in business, economics, or a related field.

The Director didn't inform the Petitioner of these evidentiary deficiencies. We will therefore remand the matter. On remand, the Director should issue a new NOIR notifying the Petitioner of the defects and explaining why they would've warranted the petition's denial. The Petitioner must submit additional evidence establishing the Beneficiary's qualifications for the offered position.

IV. ABILITY TO PAY THE PROFFERED WAGE

The record at the time of the NOIR's issuance also didn't 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). Evidence of ability to pay must generally include copies of a petitioner's annual reports, federal tax returns, or audited financial statements, beginning with the year of the petition's priority date. Id.

The labor certification states the proffered wage of the offered position of manager as $45,000 a year. As previously noted, the petition's priority date is August 10, 2006. USCIS approved the petition in March 2007. The Petitioner therefore had to demonstrate its ability to pay the proffered wage in 2006 and 2007.

The Petitioner submitted a copy of its federal income tax return for 2005. The record, however, lacks regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2006, the year of the petition's priority date, or in 2007, the year of the petition's approval before revocation. Thus, at the time of the NOIR's issuance, the record didn't establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. See 8 C.F.R. § 204.5(g)(2). The record therefore would've warranted the petition's denial on this ground.

On remand, the new NOIR should notify the Petitioner of the evidentiary deficiencies noted above and explain why they would've warranted the petition's denial. If supported by the record, the NOIR may include any additional, potential grounds of revocation. The Director, however, must afford the Petitioner a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

V. CONCLUSION

The record doesn't support the Director's revocation of the petition. But the Petitioner didn't demonstrate its ability to pay the proffered wage of the offered position or the Beneficiary's qualifying education and experience for the job.

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