U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 06548437

DATE: FEB. 7, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a food service business, seeks to employ the Beneficiary as a maintenance technician. It requests skilled worker classification for the Beneficiary under the third preference immigrant category. 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" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The petition was initially approved, but the approval was subsequently revoked by the Director of the Nebraska Service Center. The Director found that the Petitioner, in responding to a notice of intent to revoke (NOIR), did not resolve discrepancies in the record about the Beneficiary's employment history. In particular, the job experience claimed in the instant proceeding and the associated employment verification letters differed completely from the employment experience claimed by the Beneficiary in an earlier nonimmigrant visa application. In the NOIR the Director advised the Petitioner that additional evidence was needed, such as payroll records from the two South Korean companies that allegedly employed the Beneficiary and the Beneficiary's Korean national tax documents, to confirm that the Beneficiary had the qualifying experience claimed in this proceeding. The requested evidence was not submitted by the Petitioner, however, who instead submitted additional employment verification letters from the South Korean companies and clients where the Beneficiary was allegedly assigned. The Director concluded that the evidence of record did not establish that the Beneficiary met the minimum experience requirement of the labor certification, and revoked the petition's approval.

The Petitioner filed an appeal, which we rejected as late filed in accordance with the regulation at 8 C.F.R. §§ 103.3(a)(2)(v)(B)(*1*). An appeal of a revocation decision must be filed within 18 days of the date of the decision. *See* 8 C.F.R. §§ 205.2(d) and 103.8(b). The Petitioner's appeal was not received by U.S. Citizenship and Immigration Services (USCIS) or officially logged in as an appeal within the 18-day period prescribed in the regulations. After receiving correspondence from the Petitioner along with documentation showing that the appeal had been received by USCIS 29 days after the revocation decision was issued, we sent a letter to the Petitioner stating that the appeal would remain rejected.[1]

[1] We also advised that the only office with jurisdiction to determine whether an untimely appeal meets the requirements

Two weeks after our letter the Petitioner filed a motion to reopen and a motion to reconsider. The Petitioner contends that its appeal was filed within the time period indicated on the revocation decision and should be adjudicated on the merits. The timely filing of this combined motion, however, cannot cure the late filing of the original appeal under applicable regulations.[2]

Accordingly, the appeal will remain rejected.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed

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of a motion is the office that issued the unfavorable decision. On August 21, 2019, the Director of the Nebraska Service Center issued a decision which found insufficient grounds to treat the untimely appeal as a motion and let stand the denial of the petition.

[2] Even if we were to accept the appeal as timely filed and adjudicate it on the merits, which we do not as set forth above, the evidence of record would not yield a favorable result for the Petitioner. As noted by the Director in his revocation decision, the Petitioner did not submit any of the documentation specifically requested in the NOIR to reconcile conflicting information about the Beneficiary's employment history and demonstrate that he actually worked for the two South Korean companies identified in the labor certification supporting the instant petition. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.* Given the conflicting information provided by the Beneficiary in the instant immigrant petition and his prior nonimmigrant application, it was proper for the Director to request primary evidence – specifically, payroll records from the companies and tax documents from the Beneficiary – to document his employment by the South Korean companies. No such materials were submitted in response to the NOIR, on appeal, or with the current motion. In its appeal brief the Petitioner asserted that the Beneficiary "is unable to obtain copies of his national tax documents and payroll records as he does not have access to such information." However, no evidence was submitted that the Beneficiary even tried to obtain such documentation, much less that he is actually unable to do so. In visa petition proceedings the Petitioner has the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). In this proceeding the Petitioner has not met its burden of proof. It has not established that the Beneficiary gained any qualifying experience with the two South Korean companies as alleged in the labor certification. Therefore, the Petitioner has not established that the Beneficiary has the requisite five years of qualifying employment to meet the experience requirement of the labor certification or the requisite two years of experience to qualify for skilled worker classification. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B).