U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7164035

Date: FEB. 13, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a maintenance landscaper under the third-preference, immigrant classification 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).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the offered position does not qualify the Beneficiary for the requested visa classification and that the Petitioner did not demonstrate its required ability to pay the position's proffered wage.

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.* Labor certification also indicates 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 certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS).[1] *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

[1] The Petitioner's Form I-140, Immigrant Petition for Alien Worker, states that the "U.S. Department of Labor informed us that [it] sent the certification, unfortunately, the administrative office of the [Petitioner] was closed and the certification was lost." Before adjudicating the petition, USCIS obtained a duplicate copy of the certification from DOL. On appeal, the Petitioner submits the original certification without explanation.

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 REQUESTED VISA CLASSIFICATION

A position offered to a skilled worker must require at least two years of training or employment experience. Section 203(b)(3)(A)(i) of the Act. A job requiring less than two years of training or experience qualifies a beneficiary for classification as an "other worker." *See* section 203(b)(3)(A)(iii) of the Act.

"The determination of whether a worker is a skilled or other worker will be based on the requirements placed on the job by the prospective employer, as certified by [DOL]." 8 C.F.R. § 204.5(l)(4). When determining job requirements, USCIS must examine the job-offer portion of an accompanying labor certification to ascertain the minimum requirements of an offered position. 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, in part 2 of the Form I-140, the box next to 1.f. is checked, indicating the Petitioner's request for the Beneficiary's classification as "[a] skilled worker (requiring at least 2 years of specialized training or experience)." The accompanying labor certification, however, states the minimum job requirements of the offered position of maintenance landscaper as one year of experience in the job offered. The certification states that the position requires neither education, nor training. Part H.14 of the certification does not list any "[s]pecial skills or other requirements." Thus, contrary to section 203(b)(3)(A)(i) of the Act, the offered position requires less than two years of training or experience. The position therefore does not qualify the Beneficiary for the requested visa classification of skilled worker.

On appeal, the Petitioner seeks to change the requested visa classification from skilled worker to other worker. The Petitioner argues that it has consistently required only one year of experience for the offered position. As proof, the organization submits copies of documents created during the labor certification process, including the Petitioner's request for a prevailing wage for the offered position and its newspaper advertisements of the job.

To request a change in visa classification on a Form I-140, USCIS policy requires a petitioner to demonstrate that the selected classification resulted from "clerical error" before the issuance of a decision. USCIS, "Petition Filing and Processing Procedures for Form I-140," https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker (last visited Feb. 7, 2020). The Petitioner here neither describes the circumstances under which the classification was selected, nor submits documentary evidence of a clerical error. The record therefore does not indicate that the visa classification's selection resulted from clerical error.

Moreover, the timing of the Petitioner's request precludes a change of visa classification on the petition. USCIS policy states: "We cannot change the visa category if we have already made a decision on your Form I-140." *Id.* Rather, USCIS policy requires a petitioner to review the

requested visa classification stated on a Form I-140 receipt notice shortly after a petition's filing and report any misclassification before the petition's adjudication. *Id.* The record indicates that, before denying the petition, the Agency mailed the Petitioner a receipt notice identifying the selected visa classification as "SKILLED WORKER." (emphasis in original). Contrary to USCIS policy, however, the Petitioner did not report the purported misclassification until filing this appeal. We therefore decline to change the petition's requested visa classification.

For the foregoing reasons, the offered position does not qualify the Beneficiary for the requested visa classification of skilled worker. We will therefore affirm the petition's denial.

III. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, 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. *Id.* Because the Petitioner here employs at least 100 workers, however, USCIS also "may accept" a statement from a financial officer establishing the organization's ability to pay the proffered wage. *Id.*

Here, the labor certification states the proffered wage of the offered position of maintenance landscaper as $37,419 a year. The petition's priority date is September 14, 2017, 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 Petitioner's initial submission lacked any evidence of the organization's ability to pay the proffered wage. A letter from the Petitioner's assistant general manager accompanied the petition. But, contrary to the requirements of 8 C.F.R. § 204.5(g)(2), the statement does not establish or even assert the Petitioner's ability to pay. The Director therefore did not err in denying the petition without first issuing the Petitioner a written request for additional evidence or a written notice of intent to deny. *See* 8 C.F.R. § 103.2(b)(8)(ii) (authorizing USCIS to deny a petition "[i]f all required initial evidence is not submitted with the benefit request"); *see also* USCIS, "Checklist of Required Initial Evidence for Form I-140," https://www.uscis.gov/i-140Checklist (last visited Feb. 7, 2020).

On appeal, the Petitioner submits an unaudited financial statement for 2017 as evidence of its ability to pay the proffered wage. As previously indicated, however, under 8 C.F.R. § 103.2(b)(8)(ii), the Petitioner had to submit evidence of its ability to pay upon the petition's filing. Because the regulation notified the Petitioner of its need to provide proof of its ability to pay as of the petition's filing, we will not accept the 2017 financial statement for the first time on appeal. *See, e.g., Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (citation omitted). Even if we could accept the statement, it would not demonstrate the Petitioner's ability to pay the proffered wage. Contrary to 8 C.F.R. § 204.5(g)(2), the statement does not indicate that it was "audited." The record therefore would still lack required evidence of the Petitioner's ability to pay the proffered wage.

IV. THE REQUIRED EXPERIENCE

Although unaddressed by the Director, the record also does not establish that the Beneficiary has the minimum experience required for the offered position. 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).

As previously discussed, the labor certification states the minimum requirements of the offered position of maintenance landscaper as two years of experience in the job offered. The petition's priority date is September 14, 2017. On the certification, the Beneficiary attested that, by the petition's priority date, he gained more than four years of full-time experience in the job offered. He stated that a golf course in the United States employed him as a landscaper from May 2010 to October 2014. He did not list any other employment on the certification.

As evidence of claimed, qualifying experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). A letter must include the employer's name, address, and title, and describe a beneficiary's experience. *Id.* Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), however, the Petitioner did not provide a letter from the golf course listed on the labor certification application. Moreover, on his application for adjustment of status, filed in December 2018, the Beneficiary attested that the Petitioner has employed him in the offered position since April 2010. He did not list any other employment during the five years before the application's filing. In addition, although omitting the Beneficiary's start date, the 2018 letter from the Petitioner's assistant general manager states the organization's employment of the Beneficiary.

A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The Petitioner here has not explained how the Beneficiary could have simultaneously worked full-time as a landscaper for it and another golf course for more than four years. The record therefore does not establish the Beneficiary's qualifying experience for the offered position.

The Beneficiary's inconsistent employment history also suggests his willful misrepresentation of his qualifying experience on the labor certification application. A certification employer generally cannot rely on experience that a foreign national gained with it. 20 C.F.R. § 656.17(i)(3).[2]

In any future filings in this matter, the Petitioner must submit independent, objective evidence of the Beneficiary's claimed, qualifying experience. The Petitioner must also explain the Beneficiary's inconsistent statements regarding his employment history.

[2] USCIS may invalidate a labor certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

V. CONCLUSION

The Petitioner has not established that the offered position qualifies the Beneficiary for the requested visa classification of skilled worker. The record also lacks required evidence of the Petitioner's ability to pay the job's proffered wage. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.