U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-M- CORP.

DATE: FEB. 15, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a convenience store, seeks to employ the Beneficiary as a cook. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(B)(3)(A)(i). This employment-based 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. However, the Director of the Texas Service Center subsequently revoked the approval, finding that the Petitioner had not adequately explained inconsistent information provided about the Beneficiary's employment history, which cast doubt on the overall reliability of the employment-related evidence in the record. The Director concluded that the Petitioner did not establish that the Beneficiary had at least two years of qualifying experience, as required by the terms of the labor certification and for the requested classification of skilled worker.

On appeal the Petitioner submits additional documentation and asserts that it has established by a preponderance of the evidence that the Beneficiary has the requisite experience to meet the terms of the labor certification and qualify for skilled worker classification.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089, Application for Permanent Employment 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). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the

petition, the foreign national 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.

Section 205 of the Act 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c).

II. ANALYSIS

At issue on appeal is whether the evidence of record establishes that the Beneficiary had at least two years of experience as a cook by the petition's priority date,[1] as required to meet the terms of the labor certification and to qualify for classification as a skilled worker.

A. Minimum Requirements of the Labor Certification

The petition, filed in January 2003, was accompanied by a labor certification that required two years of experience in the job offered to qualify for the proffered position of cook. A beneficiary must meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date, which in this case was April 16, 2002. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The labor certification listed one prior job for the Beneficiary, stating that she was employed as a cook by the [redacted] India, from May 1995 to September 1997. As part of its initial evidence the Petitioner submitted an undated letter bearing the signature of [redacted] on the letterhead of [redacted] certifying that the Beneficiary was employed as claimed on the labor certification.

The petition was approved in December 2003. In January 2017, however, following a notice of intent to revoke (NOIR) and a response from the Petitioner, the Director revoked the petition's approval on the ground that the evidence of record did not establish that the Beneficiary had two years of qualifying experience as a cook, as required by the labor certification. The Petitioner filed a motion to reopen and a motion to reconsider, prompting the Director to issue a second NOIR to which the Petitioner responded with additional evidence. The Director then issued a second notice of revocation in September 2017, finding that although the Petitioner had submitted additional documentation that the Beneficiary worked as a cook for over two years at the [redacted] in India, this evidence was not reliable due to the failure of the Petitioner and the Beneficiary to list the Beneficiary's subsequent employment with the Petitioner on the labor certification. That employment was first mentioned in a letter from the Petitioner's president/manager in July 2017

[1] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The priority date in this case is April 16, 2002.

responding to the first NOIR, which stated that the Beneficiary had been employed by the Petitioner as a cook since February 2001. The Director found that the Petitioner had not provided a satisfactory explanation for the omission of this alleged employment from the labor certification that was filed with the DOL on April 16, 2002, and concluded that the Petitioner did not establish that the Beneficiary had at least two years of experience as a cook by the petition's priority date.

On appeal the Petitioner asserts that the evidence of record establishes the Beneficiary's work experience as a cook during the years 1995-1997 at the in India, and that the Director erred in discounting that evidence just because the Beneficiary's subsequent employment with the Petitioner was not listed on the labor certification. The Petitioner claims that this omission was due to the ineffective assistance of its original counsel, who prepared the labor certification and told the Petitioner and the Beneficiary to sign it without also instructing them to proofread it for accuracy. According to the Petitioner, neglecting to list the Beneficiary's employment with the Petitioner in the United States was harmless error and does not diminish the credibility of the documentation showing that the Beneficiary was previously employed as a cook for more than two years in India.

Following the Petitioner's appeal we referred this case to USCIS officials in India for further investigation. We received a report from that office in November 2018 which raised doubt about the credibility of the key documents submitted by the Petitioner as evidence of the Beneficiary's employment experience in India. In January 2019, therefore, we issued a notice of intent to dismiss the appeal (NOID), advising the Petitioner that two documents, in particular, raised concern:

1. The undated letter with the signature of "for on the letterhead of (submitted with the petition as initial evidence in January 2003) stating that the Beneficiary worked at the hotel as a cook from May 1995 to September 1997.
2. The affidavit from dated July 31, 2017, stating that he currently lived at India, that he was the sole owner/proprietor of the in from 1991 until 2002, and that he employed the Beneficiary as a cook from May 1995 to September 1997.

We advised the Petitioner that according to the Municipality of which is responsible for issuing registration certificates to businesses, was never the owner of Office records confirmed that the was in operation from 1991 to 2002, that it had 13 partners until 2000, that 12 of the partners withdrew in 2000, and that the remaining partner ran the business as sole proprietor until the hotel closed in 2002. was not listed in the municipality's office records as a partner or owner of at any time from 1991 to 2002.

We also advised the Petitioner that a site visit to the address identified in July 2017 as his residence – – revealed that the current resident is not that was identified as the property owner, and that all residents of the are family members and According to the

current resident of [redacted] never lived in the [redacted] residential community. This information, we indicated to the Petitioner, was confirmed by another resident of the [redacted] who stated that he had been a resident since 2002, that house number [redacted] was owned by [redacted], that nobody by the name of [redacted] had ever lived in the [redacted]

Based on the information described above, we advised the Petitioner that it appeared [redacted] did not reside at [redacted] in [redacted] as claimed in his July 2017 affidavit, and never had an ownership interest in the [redacted] where he claimed to have employed the Beneficiary as a cook from 1995 to 1997. We indicated that this derogatory information cast severe doubt on the veracity of the undated letter and affidavit of [redacted] in which he claimed to have employed the Beneficiary. We concluded by advising the Petitioner that if we determine the evidence of the Beneficiary's employment at the [redacted] was not credible, the Beneficiary would not meet the minimum experience requirement of the labor certification by the priority date of April 16, 2002.

In response, the Petitioner expresses disagreement with the NOID, asserting that it is unclear whether [redacted] was ever personally asked whether he owned the house at [redacted] that the longtime resident of the [redacted] residential community who stated that nobody named [redacted] ever lived at house number [redacted] was not identified, and that no records from the [redacted] were provided to confirm that [redacted] was not among the [redacted] listed owners. The Petitioner states that it contacted some individuals in [redacted] India, and obtained affidavits that rebut the information provided in the NOID relating to the ownership and residents of the house at [redacted] as well as the ownership of the [redacted]

With regard to the residence at [redacted] the Petitioner asserts that the property is owned by [redacted], not [redacted] As evidence thereof the Petitioner submits a letter dated January 17, 2019, from an individual identifying himself as the president of the [redacted] on the letterhead of that organization, certifying that the residential property at [redacted] is owned by [redacted] as well as a series of tax and utility bills identifying that individual as the property owner. The Petitioner also submits an affidavit from [redacted] who confirms that he is the owner of [redacted], that he does not live there, and that he rented the house to [redacted] from January 5, 2017, to March 31, 2018. An additional affidavit from the latter individual confirms that he rented this house from [redacted] during the aforesaid time frame, and asserts that he sublet a room to [redacted] a.k.a. [redacted] for the three month period from June 1, 2017, to August 31, 2017. According to the Petitioner, since [redacted] and [redacted] are the same person, the address [redacted] identified as his residence in his affidavit of July 31, 2017, was correct, thereby lending credence to the affidavit.

While the foregoing documentation may indicate that the owner of the residential property at [redacted] is [redacted] it does not clearly show that [redacted] ever lived there as a tenant. Both [redacted] and [redacted] assert that the former rented [redacted] to the latter for the time period of January 5, 2017, to March 31, 2018. Since [redacted] was no longer the tenant of the property after March 31, 2018, it is inexplicable how he could have sublet a room to [redacted] from June 1 to August 31, 2018.

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.*

The only evidence submitted by the Petitioner to resolve the above described inconsistency between the dates of the primary tenant's residence at [redacted] and the dates of [redacted] alleged residence at that address as a sub-tenant is a pair of affidavits from [redacted] a resident of [redacted] who states that [redacted] alias [redacted] lived at that address "for three months until August 2017" without further elaboration. According to the Petitioner, [redacted] himself is no longer available to clarify this matter because he is now retired and living in a remote village in [redacted] India. The Petitioner has provided no evidence, however, that it ever tried to contact [redacted] or that [redacted] is actually unreachable. No independent objective evidence has been submitted, such as a sub-lease agreement or rental payments, to confirm [redacted] residence at the subject address from June through August 2017. Based on the entire record, including the results of our onsite investigation, we conclude that the Petitioner has not established that [redacted] resided at [redacted] in July 2017, as claimed on his second affidavit asserting that the Beneficiary was employed by the [redacted] in the years 1995-1997. This unresolved matter casts doubt on the affidavit's overall reliability, and limits its evidentiary weight.

The more pressing matter on appeal, however, is [redacted] assertion in his 2017 affidavit that he was the sole owner/proprietor of the [redacted] from 1991 to 2002. This claim is contradicted by the Municipality of [redacted] whose office records confirm that the hotel was co-owned by 13 partners from 1991-2000, and by one remaining partner for the next two years until the hotel closed in 2002. As previously stated, [redacted] was not listed in the office records as either a partner or an owner of the hotel at any time from 1991 to 2002. The office records do indicate that [redacted] was one of the 13 partners from 1991 to 2000, and that he was the sole proprietor from 2000 to 2002. As previously discussed, the Petitioner claims that [redacted] and [redacted] are the same person. According to the Petitioner, it is common for a person in India to have multiple names, such as an official name and a nickname, which explains why [redacted] is also known as [redacted] The two affidavits from [redacted] a resident of [redacted] and one of the [redacted] 13 partners from 1991 to 2000, also claim that [redacted] and [redacted] are the same person, with the former

being his official name. Nowhere in the record, however, has [redacted] himself acknowledged a second name of [redacted]. Both his undated letter submitted with the petition in 2003 and his affidavit submitted in response to the second NOIR in 2017 were signed [redacted] without any reference to a second "official" name. Nor have any government records or other official documents been submitted to show that [redacted] has a second name of [redacted] Furthermore, even if we accepted the Petitioner's contention that [redacted] and [redacted] are the same person, the records of the Municipality of [redacted] indicate that [redacted] was not the sole owner/proprietor of the [redacted] from 1991 to 2000, as asserted by [redacted] in his 2017 affidavit, but rather one of 13 partners during those years. This fact casts further doubt on the reliability of [redacted] letter in 2003 and his affidavit in 2017 claiming to have employed the Beneficiary as a cook from May 1995 to September 1997. Finally, there is no primary evidence in the record, such as an employment contract or pay statements, documenting any employment of the Beneficiary by the [redacted]

For all of the reasons discussed above, we conclude that the Petitioner has not established that the Beneficiary had two years of qualifying experience as a cook by the priority date of April 16, 2002, as required by the labor certification.

B. Eligibility for Classification as a Skilled Worker

A petition requesting skilled worker classification "must be accompanied by evidence that the [beneficiary] meets the educational, training or experience, and any other requirements of the individual labor certification. . . . The minimum requirements for this classification are at least two years of training or experience." 8 C.F.R. § 204.5(l)(3)(ii)(B). As discussed in this decision, the evidence of record does not establish that the Beneficiary had at least two years of qualifying experience as of the petition's priority date. Therefore, she does not qualify for classification as a skilled worker.

III. CONCLUSION

The Petitioner has not established that the Beneficiary had at least two years of qualifying employment by the priority date of April 16, 2002, as required to meet the experience requirement of the labor certification and to qualify for classification as a skilled worker.

ORDER: The appeal is dismissed.

Cite as *Matter of C-M- Corp.*, ID# 1095157 (AAO Feb. 15, 2019)