U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-R-, LLC

DATE: FEB. 22, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as a cook specializing in Japanese cuisine. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This classification allows a U.S. business to sponsor a foreign national with at least 2 years of training or experience for lawful permanent resident status.

The Director, Texas Service Center, denied the petition. The Director concluded that the record did not establish the Beneficiary's possession of the minimum experience required for the offered position and the requested classification.

The matter is now before us on appeal. The Petitioner asserts that it has established the Beneficiary's possession of the required experience.

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

I. LAW AND ANALYSIS

A. Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, a prospective U.S. employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (labor 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). Next, the employer files a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves the petition, a 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.

By approving the labor certification in this case, the DOL certified that U.S. workers are not able, willing, qualified, and available for the offered position of Japanese cuisine cook. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the Beneficiary's employment in the position

will not hurt the wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5)(A)(i)(II).

At issue is whether the Beneficiary meets the requirements of the offered position certified by the DOL. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service "makes its own determination of the alien's entitlement to [the requested] preference status").

B. The Beneficiary's Possession of the Required Experience

A beneficiary of a skilled worker petition must possess at least 2 years of training or experience. Section 203(b)(3)(A)(i) of the Act; 8 C.F.R. § 204.5(l)(2) (defining the term "skilled worker"). A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. § 103.2(b)(l), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In this case, the labor certification stated the minimum requirements of the offered position of Japanese cuisine cook as 24 months of experience in the job offered. No training or education was required. The labor certification stated the job duties of the offered position as "[p]repar[ing] & cook[ing] traditional Japanese cuisine dishes such as . . . sushi, sashimi, rolls & other traditional Japanese dishes following seasonal customs and special holiday occasions."

The Beneficiary attested on the labor certification to approximately 27 months of full-time experience in the job offered. The Beneficiary stated his employment by [redacted] restaurant in South Korea from December 7, 2006, to July 31, 2007, and from December 1, 2007, to June 30, 2009. A petitioner must support a beneficiary's claimed qualifying experience with a letter from an employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must provide the name, address, and title of the employer, and a description of the beneficiary's experience. *Id.*

Here, the Petitioner submitted a May 9, 2013, experience certificate from the purported former president of [redacted] restaurant. Consistent with the Beneficiary's attestation on the labor certification, the certificate stated the restaurant's employment of the Beneficiary as a Japanese cuisine cook from December 7, 2006, to July 31, 2007, and from December 1, 2007, until the restaurant closed on June 30, 2009.

As indicated in the Director's request for evidence (RFE), however, the record lacked evidence of an affiliation between the certificate's signatory and [redacted] The certificate was not written on the restaurant's stationery. Thus, the record did not corroborate the signatory's claimed former position with [redacted] or establish the certificate as "from" an employer of the Beneficiary under 8 C.F.R. § 204.5(l)(3)(ii)(A).

Also, the English translation of the certificate stated the Beneficiary's job duties at [redacted] almost exactly as stated on the labor certification. The word-for-word recitation of the offered position's job duties suggested that the signatory did not write the certificate and lacked personal knowledge of the Beneficiary's experience. A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner here must therefore resolve inconsistencies regarding the Beneficiary's claimed qualifying experience by independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of remaining evidence of record. *Id.* at 591.

In response to the RFE, the Petitioner's president stated that counsel's office mistranslated the certificate into English. The Petitioner submitted a new translation from a third party stating the Beneficiary's job duties slightly differently than in the prior translation and on the labor certification. The response also included government tax records of [redacted] business registration and closure, and an affidavit from the restaurant's purported former manager, stating the Beneficiary's employment there as a Japanese cuisine cook during the periods stated on the labor certification. But, for the reasons discussed below, the Petitioner's response does not resolve the inconsistencies present in the record. Rather, the documents submitted introduced additional inconsistencies and questions concerning the Beneficiary's claimed qualifying experience.

First, the business registration document states an affiliation between the certificate's signatory and [redacted] but the business closure document identifies another representative of the restaurant. The record therefore does not establish that the certificate's signatory remained affiliated with the restaurant throughout the Beneficiary's claimed tenure with it, gaining personal knowledge of all his claimed experience. The business registration document indicates the former president's affiliation with the restaurant at the time of its opening on December 7, 2006, but the record lacks corroborating evidence of her claimed affiliation with the restaurant throughout the Beneficiary's claimed 27-month tenure ending June 30, 2009. The Petitioner states that, because [redacted] closed before the Beneficiary requested an employment letter, documentary evidence of the Beneficiary's employment could not be written on restaurant stationery. The Petitioner also notes that USCIS regulations do not expressly require a letter on the stationery of a former employer. Although the regulations do not require letters on the stationery of former employers, the Petitioner must submit letters "from" the Beneficiary's employers. 8 C.F.R. § 204.5(l)(3)(ii)(A); *see also* 8 C.F.R. § 204.5(g)(1). The record therefore must contain evidence of a signatory's affiliation with a purported employer. Here, the record lacks sufficient evidence of the affiliations between [redacted] and its purported former president and former manager.

Second, the business closure document states that [redacted] closed on September 30, 2010, not on June 30, 2009, as stated in the certificate. On appeal, the Petitioner asserts that the September 30, 2010, date on the business closure record refers to the date of [redacted] corporate dissolution, not the date that its business closed. But the Petitioner has not submitted any evidence to support this claim. The English translation of the government record submitted by the Petitioner states the restaurant's "Date of Closing" as "9/30/2010." The Petitioner must resolve the inconsistency with independent, objective evidence. *See Ho*, 19 I&N Dec. at 591.

Third, both the business registration and closure documents classify [redacted] as a "Korean Food" restaurant, suggesting that the Beneficiary did not cook Japanese cuisine as required for the offered position. On appeal, counsel asserts that USCIS incorrectly assumed that [redacted] did not serve Japanese food. Although [redacted] was classified as a "Korean Food" restaurant on its business registration and closure documents, counsel asserts: "Due to cultural and geographic reasons, it is very common for restaurants in Korea to also offer Japanese style food for their customers." But counsel's assertion is not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). [redacted] classification as a Korean food restaurant on the government tax records suggests that it served only Korean cuisine. The record does not establish that [redacted] served Japanese-style food and therefore that the Beneficiary worked as a Japanese cuisine cook for the restaurant as he claims.[1]

On appeal, the Petitioner states that tax evidence of the Beneficiary's employment by [redacted] is unavailable because the restaurant paid him in cash, or "under the table." Citing *Matter of B&B Residential Facility*, 2001-INA-00146, 2002 WL 1586297 (BALCA July 16, 2002), the Petitioner therefore asserts that the documents from [redacted] former president and manager are sufficient to establish his under-the-table employment. In *B&B*, the Board of Alien Labor Certification Appeals (BALCA) held that foreign nationals may rely on unpaid or under-the-table experience to qualify for offered positions on labor certifications. 2002 WL 1586297 at *3. But the decision stated that foreign nationals will "need to present credible supporting documentation of the work and/or corroborating affidavits or declarations of witnesses with personal knowledge." *Id.* The Petitioner asserts that, under *B&B*, the statements from [redacted] former president and manager constitute sufficient evidence of the Beneficiary's qualifying experience.

We are not bound by BALCA decisions. *See* 8 C.F.R. § 103.10(b) (stating that we are bound by decisions of the Board of Immigration Appeals and the Attorney General). Moreover, as previously discussed, the record does not establish affiliations between [redacted] and its purported former president and manager, or the restaurant's service of Japanese cuisine. The Petitioner has not

[1] The Petitioner further asserts that USCIS was required to afford it opportunities to explain [redacted] classification as a Korean food restaurant and the inconsistency in the restaurant's closing date. But USCIS need only afford a petitioner an opportunity to respond to derogatory information of which it is "unaware." 8 C.F.R. § 103.2(b)(16)(i). Here, the Petitioner itself submitted the records that classified the restaurant and stated its closing date. Also, pursuant to the instructions to Form I-290B, Notice of Appeal or Motion, the Petitioner could have submitted additional evidence on appeal. *See* 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations).

resolved the inconsistencies of record with independent objective evidence. *See Ho*, 19 I&N Dec. at 591. We therefore do not find the documents from the purported former supervisors of the Beneficiary to be credible supporting documentation of the Beneficiary's claimed employment by the restaurant.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the experience required for the offered position and the requested classification. We will therefore affirm the Director's decision and dismiss the appeal.

Finally, although not mentioned by the Director, we note that the Beneficiary previously reported on U.S. State Department visa applications that he was a "student" and was not employed during the time period in question. Specifically, although the Beneficiary now claims to have been employed from December 7, 2006, to July 31, 2007, and from December 1, 2007, to June 30, 2009, he stated that his occupation was "student" on both a March 2007 and a June 2007 visa application. In a later visa application submitted in December 2011, the Beneficiary again reported his occupation as "student" and answered "No" to the question "Were you previously employed?" The information provided by the Beneficiary on these visa applications further contradicts the Petitioner's assertion that he has the experience claimed on the labor certification. As the Petitioner has not previously been given notice of this derogatory information, it will not be considered a basis for dismissal of the appeal. *See* 8 C.F.R. § 103.2(b)(16)(i) (a Petitioner must be afforded an opportunity to respond to derogatory information of which it is unaware). However, the Petitioner must resolve this issue in any future filings concerning this labor certification.

II. CONCLUSION

The Petitioner has not established that the Beneficiary has the experience required by the terms of the labor certification or for classification as a skilled worker. A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of S-R-, LLC*, ID# 123211 (AAO Feb. 22, 2017)