U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF MIRE- INC.

DATE: JAN. 13, 2020

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of electrical services, sought to employ the Beneficiary as an office secretary.[1] It requested her immigrant visa classification under the third-preference category as a skilled worker. *See* section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least two years of training or employment experience.

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum experience required for the offered position and the requested visa classification.

On appeal, the Petitioner submits additional evidence. It argues that, although the Beneficiary gained part of her experience while still in high school and while visiting the United States for an extended period, the record establishes her qualifications for the offered position and the requested classification.

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,

[1] Online government information indicates that Illinois officials dissolved the petitioning corporation in 2018. *See* Ill. Sec'y of State, "Corporate/LLC Search/Certificate of Good Standing," https://www.ilsos.gov/corporatellc/CorporateLlcController (last visited Oct. 30, 2019). The Beneficiary seeks to "port" to another employer. *See* section 204(j) of the Immigration and Nationality Act (the Act), 8 C.F.R. § 1154(j) (allowing certain beneficiaries of valid I-140 petitions to change jobs or employers without need for new petitions on their behalf if their new jobs fall under the same or similar occupational classification as their prior offered positions).

qualified, and available for an offered position, and 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 labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act. 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 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.

"[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 the record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS properly issues a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). USCIS properly revokes a filing's grant if a petitioner's NOIR response do not overcome the revocation grounds stated in the notice. *Id.* at 751-52.

II. REQUIRED EXPERIENCE

As previously indicated, a skilled worker must have at least two years of training or experience. Section 203(b)(3)(A)(i) of the Act. A petitioner must also establish that a beneficiary met 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).[2] 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).

Here, the labor certification states the minimum requirements of the offered position of office secretary as a U.S. high school diploma, or a foreign educational equivalent, and two years of experience in the job offered or as an administrative assistant. The labor certification also states that the position requires an ability to "communicate in Polish."

On the labor certification, the Beneficiary attested that, by the petition's priority date, she obtained the Polish educational equivalent of a U.S. high school diploma and more than two years of full-time, qualifying experience in Poland. The Beneficiary stated her employment as an administrative assistant at a public library from April 2007 to May 2009.

[2] This petition's priority date is May 5, 2015, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

To support the Beneficiary's qualifications, the Petitioner submitted a copy of her high school diploma and final results, indicating her graduation in April 2008. The Petitioner also submitted a copy of an employment certificate from the library's manager, confirming that the facility employed the Beneficiary as an administrative assistant from April 2007 to May 2009.

The Director's NOIR, however, noted that the Beneficiary claimed to gain full-time employment experience from September 2007 to April 2008 while she completed her final year of high school. The NOIR stated that typical Polish school days run from about 8:45 a.m. to 2:45 p.m. on weekdays. *See, e.g.*, Polish Culture, http://culture.polishsite.us/articles/art374fr.htm (last visited Oct. 30, 2019). The NOIR also stated that the library's website listed the facility's hours as 9 a.m. to 5 p.m. on weekdays, and 9 a.m. to 2 p.m. on Saturdays. Citing USCIS records, the NOIR further stated that, during the Beneficiary's claimed 25-month tenure with the library, she visited the United States for more than two months - from June 6, 2008, to September 20, 2008. The NOIR therefore alleged that, contrary to the Beneficiary's attestation on the labor certification application, she gained less than the requisite two years of full-time, qualifying experience at the library in Poland.

The Director properly issued the NOIR. Given the overlapping hours of the library and the Beneficiary's high school, the record did not explain how she gained her claimed 25 months of full-time, qualifying experience. The Beneficiary's visit to the United States of more than two months further undermined her claimed possession of the requisite qualifying experience. *Id.* The unresolved discrepancies cast doubt on the Beneficiary's qualifications for the offered position and the requested visa classification. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). The unexplained and unrebutted record therefore would have warranted the petition's denial.

In its NOIR response, the Petitioner submitted a sworn, written statement of the Beneficiary. The Beneficiary stated that she performed the duties of an administrative assistant for the library from April 2007 to May 2009. Contrary to her attestation on the labor certification application, however, she identified her job title with the library as "intern," not "administrative assistant." She stated that she was able to both work and study during her final year of high school because the library was only about 10 minutes from her school and she went to the library immediately after her daily classes ended. The Beneficiary also stated that her work for the library was not limited to its hours of public operation. She further stated that, when she visited the United States in the summer of 2008, the library granted her "time off/leave of absence." Because she visited the United States during a period when many Polish residents took vacations, she stated that the library was not busy then and her absence did not interrupt its operations. The Beneficiary also stated that, while in the United States, she worked online on projects for the library.

On appeal, the Petitioner submits another employment certificate from the library.[3] The certificate states that, from April 2007 to May 2009, the Beneficiary "helped in the role of administrative assistant." The certificate states that the library "frequently received assistance from students and graduates of a nearby high school" and that they "worked outside the [library's] normal business

[3] The new certificate has the same signatory as the prior one. Unlike the prior certificate, however, the new one identifies the signatory as the library's curator, rather than its manager.

hours." The new certificate, however, does not specify whether the Beneficiary worked for the library during the 25-month period on a full-time basis. The new certificate also does not detail whether she continued to work for the library, or to receive payment from it, during her visit to the United States in the summer of 2008.

The Petitioner argues that the Beneficiary's "unpaid time" visiting the United States "does not interrupt [her] employment [by the library] as [her] employment was not terminated during this time." Even if the library did not terminate the Beneficiary's employment, however, the Petitioner has not demonstrated that she gained full-time, qualifying experience during the time period she was outside Poland and in the United States from June 8, 2008, to September 20, 2008. The labor certification states that the offered position requires experience "in the job offered" or as an administrative assistant of at least two years. Experience "in the job offered" means experience "performing the key duties of the job opportunity." *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. at *4 (BALCA Oct. 24, 2011) (citations omitted).[4] Thus, experience as an administrative assistant means experience performing the duties of the occupation of administrative assistant. The record lacks independent, objective evidence that for more than two months - from June 6, 2008, to September 20, 2008 - the Beneficiary performed the claimed qualifying duties of an administrative assistant. The library may not have terminated the Beneficiary's employment between April 2007 and May 2009. But, contrary to the requirements of the offered position and the requested visa classification, the record does not establish that she performed full-time, qualifying duties for at least two years.

The Petitioner also cites BALCA decisions. *See Matter of B&B Residential Facility*, 2001-INA-00146 (BALCA July 16, 2002); *Matter of Ms. Lendy Muller*, 1998-INA-00237 (BALCA Sept. 17, 1999). These cases, however, provide little support for the Petitioner's claim that the Beneficiary met the experience requirements of the offered position and the requested classification. *B&B* holds that qualifying employment experience may include unpaid experience, or experience unreported to government labor or tax authorities. *B&B*, 2001-INA-00146, slip op. at *4. Unlike in *B&B*, however, the Petitioner does not claim that the Beneficiary worked for the library without payment or "under the table," nor did the Director revoke the petition's approval for that reason. In *Muller*, a foreign national could not obtain a requested letter from her claimed former employer, and DOL found a letter from a neighbor of the claimed former employer insufficient to demonstrate the foreign national's qualifying experience for an offered position. 1998-INA-00237, slip op. at *3. Here, however, the record does not indicate any obstacles to the Petitioner's submission of a letter from the Beneficiary's former employer, as the Petitioner in fact submitted two of them. The facts of this case therefore distinguish it from the BALCA decisions cited by the Petitioner.

The Petitioner contends that it submitted stronger evidence of qualifying experience than the labor certification employer in *B&B*. The employer in *B&B* did not submit any employment letters in support of the foreign national's qualifying experience. The two letters submitted by the Petitioner

[4] Decisions of the Board of Alien Labor Certification Appeals (BALCA) do not bind USCIS in matters involving the same issues. *See* 8 C.F.R. § 103.10(b) (stating that Department of Homeland Security employees must follow precedent decisions of the Board of Immigration Appeals and the U.S. Attorney General). USCIS, however, may consider BALCA decisions as persuasive authority.

would constitute stronger evidence of qualifying experience than provided by the *B&B* employer, however, as previously indicated, the Petitioner's evidence is not strong enough to meet its burden of demonstrating eligibility by a preponderance of evidence. The library's letters do not confirm the claimed, full-time nature of the Beneficiary's employment. Also, the letters do not establish the Beneficiary's continued work for the library while she visited the United States in 2008. The record therefore does not establish the Beneficiary's possession of at least two years of full-time, qualifying experience.

III. CONCLUSION

For the foregoing reasons, the record on appeal does not establish the Beneficiary's possession of the minimum employment experience required for the offered position and the requested visa classification. We will therefore affirm the petition's revocation. As in petition proceedings, a petitioner in revocation proceedings bears the burden of demonstrating eligibility for a requested benefit. *Matter of Ho*, 19 I&N Dec. at 589 (citation omitted). The Petitioner here has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of MIRE-, Inc.*, ID# 6461321 (AAO Jan. 13, 2020)