U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23094939

Date: JAN. 18, 2024

Certification of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a fashion accessories wholesaler and importer, sought to employ the Beneficiary as a jewelry repairer. It requested 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 noncitizen for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center revoked the approval of the petition, concluding that the immigrant petition was approved in error. The Director determined that the Petitioner did not overcome discrepancies related to the Beneficiary's required work experience abroad listed in the labor certification, after the issuance of a notice of intent to revoke (NOIR). In addition, the Director concluded that the Beneficiary misrepresented material facts related to her claimed foreign employment. The Petitioner later filed an appeal, that we rejected as untimely. The Petitioner later filed a motion to reconsider contending our rejection was in error. Following this, the Director treated the rejected appeal as a motion to reopen and issued another decision leaving the revocation undisturbed. Thereafter, we requested that this matter be certified to us for review. The Director issued another decision on the merits, largely consistent with its initial revocation decision, and certified it to us for review. As such, the matter is now before us on certification pursuant to 8 C.F.R. § 103.4(a).

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon review, we conclude that the Director had good and sufficient cause to revoke the petition in August 2020 as the Petitioner did not establish that the Beneficiary had the required experience for the offered position. As such, we will revoke the petition. In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361.

Since the issue of the Beneficiary's lack of required experience is dispositive, we decline to reach and hereby reserve its arguments with respect to whether she misrepresented material facts, as our analysis of this issue would not alter our determination that the petition must be revoked. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues

the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

In addition, the Petitioner filed an appeal that we rejected as untimely. Upon review, we acknowledge that the rejection of this appeal was in error, and we withdraw this rejection. As such, we will consider the Petitioner's assertions on appeal with respect to whether the Beneficiary had the required experience for the offered position.[1]

I. LAW

Employment-based immigration 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) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the 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). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the 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.

At 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, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS may issue a notice of intent to revoke (NOIR) if the unrebutted and unexplained record, as of the NOIR's issuance, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, USCIS may revoke a petition's approval if a petitioner's response does not overcome the grounds stated in a NOIR. *Id.* at 452.[2]

II. EXPERIENCE REQUIRED FOR THE OFFERED POSITION

The sole issue before us is whether the Beneficiary had the required experience for the offered position, and if not, whether the approved petition must be revoked.

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[1] Given our review of this matter on certification, including the entire record, we now consider the Petitioner's rejected appeal [redacted] and the later motion to reconsider addressing our rejection [redacted] moot.

[2] The Form I-140 filed on behalf of the Beneficiary was approved by the Director of the Texas Service Center on October 21, 2011. The Director later revoked this approved petition on August 11, 2020, following the issuance of a notice of intent to revoke (NOIR) on August 31, 2017.

A skilled worker must be capable of "performing skilled labor (requiring at least 2 years training or experience)." Section 203(b)(3)(A)(i) of the Act. A petitioner must establish a beneficiary's possession of 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).[3] 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 the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

A. Facts and procedural history

The labor certification stated that the offered position required 24 months of experience "in the job offered." The labor certification further indicated that the Petitioner would not accept experience in an alternate occupation. The job duties for the offered position as a jewelry repairer were listed as:

> Repair, redesign, or reassemble existing pieces of jewelry by reducing or enlarging sizes, soldering pieces together or replacing broken clasps and mountings upon client's request; set ornamental stones in jeweled items such as rings, earrings, bracelets and other jeweled items; position metal pieces in place using setting and hand tools; clean and polish items and jewelry pieces; may perform precision casting and modeling of molds and casting molds.

The Petitioner asserted that the Beneficiary gained experience as a jewelry repairer 40 hour per week from January 3, 2005, to October 25, 2008, working for a jewelry wholesaler [redacted] (the foreign employer), in South Korea. The initial evidence submitted with the petition included a "Certificate of Career" from the president of the claimed former employer. This certificate listed the Beneficiary's duties as follows:

> Put jewel on metallic parts
> Fix size of accessories such as rings etc.
> Clean and shine jewel
> Repair of jewel

Following the approval of the petition, the Director sent a NOIR stating that, upon further review, it appeared the petition had been approved in error. The Director informed the Petitioner that the Beneficiary's claimed employment was inconsistent with employment listed in government records where she listed employment with [redacted] in South Korea from 2005 through 2006, and later with [redacted] prior to her entry into the United States as a nonimmigrant in October 2008.[4] The Director indicated this discrepancy reflected that the Petitioner may have willfully

[3] This petition's priority date was October 14, 2010, the date the 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).

[4] The government records discussed by the Director were a DS-156, nonimmigrant visa application filed with the Department of State (DOS) in October 2007 within which the Beneficiary indicated that she had been employed as an "employee-porcelain part" with [redacted] and a DS-157 supplement to this form stating that she had also been

misrepresented her previously asserted foreign employment as a jewelry repairer with the foreign employer. In addition, the Director requested that the Petitioner submit the Beneficiary's National Tax Service of Korea (NTSK) records and other evidence to substantiate her employment with the foreign employer as a jewelry repairer.

In response to the NOIR, the Petitioner stated that the Beneficiary did not previously list her employment with the foreign employer on the nonimmigrant visa application with the DOS "because of a miscommunication with her prior lawyer." The Petitioner further provided a "verification letter" from the then president of the foreign employer stating that he "remember[ed] [the Beneficiary] based on her unique background – she worked as a jewelry repairer while she studied to be a dental technician." The president of the foreign employer also indicated that "due to the nature of the business our peak hours were on the weekends, and she stayed late on those days to finish orders."

In addition, the Petitioner submitted an affidavit from the Beneficiary within which she stated: "I finished my studies as a dental technician and worked at a precious metal company called [redacted]." The Beneficiary also indicated that she "worked at [the foreign employer] from Friday to the end of most weekends all night, and during the weekdays, I worked as a dental technician." The Beneficiary further explained that she filed tax returns specific to her employment at the dental clinics, but that the owner of the foreign employer stated that she did not "make enough money to file [her income with the foreign employer] and [that she] was already filing income taxes through other companies." The Petitioner also submitted translations of the Beneficiary's bank records it claimed reflected payments to her from the foreign employer from January 2005 to October 2008.

In revoking the approved petition, the Director pointed to the inconsistency in the Beneficiary's assertions, namely that she did not earn enough to report her income with the foreign employer to South Korean tax authorities, while reporting other income earned from [redacted] during her asserted time of employment with the foreign employer. The Director concluded that this evidence indicated that the Beneficiary had not been employed fulltime with the foreign employer or that she had gained the required 24 months of experience as a jewelry repairer.

In support of its later appeal, the Petitioner contended that the Director should have accepted the evidence of wages paid to the Beneficiary, reflected in her bank accounts, as evidence of her fulltime employment with the foreign employer and the required 24 months of experience as a jewelry repairer. The Petitioner states that these payments, ranging from 600,000 South Korean Won (KRW) to 880,000 KRW from January 2005 to October 2008, substantiate her fulltime employment with the foreign employer and required experience. The Petitioner provided average hourly wage tables for each year and stated the following:

> A jewelry repairer is a low-wage job in Korea considering that the current wage of an entry level jewelry repairer is 105.45% of the minimum wage. The beneficiary received the wages of 122.40% to 129.50% of the minimum wages on a full-time basis during her employment with [redacted]. The beneficiary's bank statements establish the beneficiary's receipt of the wages of a full-time jewelry repairer.

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employed in the same position with [redacted] from 2005 to 2006. Neither form listed the Beneficiary's claimed employment as a jewelry repairer with [redacted].

The Petitioner also submitted an affidavit from the owner of the foreign employer stating he thought that USCIS would "take fulltime employment [of the Beneficiary] for granted," since "jewelry repairers working at Jewelry shops work long hours." The owner of the foreign employer further indicated that the Beneficiary "worked for 7 hours from 5 pm to 12 am on Fridays, and 16 hours a day from 8 am to 12 am on Saturdays and Sundays." Likewise, the Petitioner provided another affidavit from the Beneficiary asserting the Director did not sufficiently consider the bank account records reflecting her receipt of payments from the foreign employer. The Beneficiary stated that her low wages were not a reflection of parttime work, but showed typical wages paid to jewelry repair employees in South Korea "a little bit above" minimum wage. The Petitioner further submitted another a partial translation of the Beneficiary's bank records reflecting the "relevant portion only," namely the asserted payments made to her from the foreign employer from January 2005 through October 2008, and not all other portions of her bank records.

Following our rejection of the Petitioner's appeal, the Director treated the appeal as a motion to reopen and issued another decision. In this decision, the Director stated that the Petitioner did not sufficiently explain why the Beneficiary failed to report her income from the foreign employer to South Korean tax authorities or why this employment was not reflected in her nonimmigrant visa application filed with the DOS in 2007. The Director determined that the revocation of the approved petition would remain undisturbed. After this decision, we recognized our error in rejecting the appeal and acknowledged the Director's subsequent motion decision. As such, we requested that the matter be certified to us pursuant to 8 C.F.R. § 103.4(a). The Director proceeded to issue another decision, largely reiterating the determinations set forth in the prior decisions. We note that the Petitioner did not submit additional evidence or assertions following the certification of this matter to us, so we will consider the record complete as currently constituted.

B. Analysis

As a preliminary matter, our adjudication here is focused on whether the Director had good and sufficient cause to revoke the previously approved petition in 2020 following the issuance of the NOIR in 2017. We conclude that the Director issued the NOIR for good and sufficient cause. The Beneficiary's claim that she was employed as an "employee-porcelain part" at two dental clinics in South Korea in a nonimmigrant visa application in 2007 contradicted her asserted employment listed on the labor certification and in the submitted letters and affidavits. Although we acknowledge that the Director was somewhat unclear as to where the information as to the Beneficiary's contradictory foreign employment was gained, the Petitioner does not dispute this employment and received sufficient notice of the discrepancies. The record lacked sufficient reliable evidence of the Beneficiary's qualifying experience for the offered position. The Petitioner was required to resolve discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response, the Petitioner did not submit sufficient evidence to overcome the uncertainty raised by the inconsistencies between the Beneficiary's asserted employment with the foreign employer, and her reported employment with two dental clinics during the same period. The Petitioner continually points to the Beneficiary's bank records reflecting payments made by the foreign employer to the Beneficiary from 2005 to 2008. As discussed by the Director, the Petitioner provided insufficient

explanation as to why this income was not reported to the South Korean government during this time, while purportedly her employment with the dental clinics had been during the same period. The Petitioner and Beneficiary only state that her wages were low, she was reporting other income from the dental clinics, and the owner of the foreign employer stated that she did not need to report this income. However, these reasons are insufficient and provide little reasonable basis for the Beneficiary's failure to report these wages or the lack of tax returns to corroborate her qualifying employment.

Further, on appeal, the Petitioner later contended that her wages were "122.40% to 129.50% of the minimum wages on a full-time basis," while a typical jewelry entry-level repairer received "105.45% of the minimum wage." Therefore, the Petitioner's and Beneficiary's statements appear incongruent, as they both claim that she did not report her income with the foreign employer because it was too low, yet they indicate she was earning anywhere from 22.4% to 29.5% more than the minimum wage in South Korea during her employment with the foreign employer, substantially more than an entry level jewelry repairer in that country. In addition, the Petitioner does not provide an indication as to what she earned while working at the two dental clinics during that same time, as it would be probative to compare these wages and understand why one was reported, while her wages with the foreign employer were not for being "too low." The Petitioner also submits no basis in foreign law for her lack of tax returns related to her asserted employment as a jewelry repairer. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if a petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973).

As such, the Petitioner has provided little reasonable basis for the lack of tax documentation to support her employment for 24 months with the foreign employer on a fulltime basis, nor why there is no other supporting documentation to substantiate this employment, such as paystubs, payroll records, employment contracts, personnel forms, employer's tax documentation, or other similar evidence. The lack of other evidence is particularly noteworthy, since in the NOIR, the Director specifically requested that the Petitioner submit the Beneficiary's National Tax Service of Korea (NTSK) records and other evidence to substantiate her employment with the foreign employer as a jewelry repairer. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

It is also noteworthy that at the time of the NOIR response, the Petitioner provided no indication as to how the asserted payments to the Beneficiary demonstrated fulltime employment with the foreign employer. The Petitioner also provided no plausible explanation for why the Beneficiary did not report her employment with the foreign employer in her the DOS nonimmigrant visa application, only vaguely stating that this was "because of a miscommunication with her prior lawyer." We observe the Beneficiary signed the nonimmigrant visa application, attesting that the information on the application was true and correct. The Beneficiary's signature "establishes a strong presumption" that she knew and assented to the contents. *See Matter of Valdez*, 27 I&N Dec. 496,499 (BIA 2018).

Similarly, section K of the labor certification, filed on October 13, 2010, related to "alien work experience" required that the Beneficiary "list all jobs the [foreign national] held during the past 3 years." Considering that this reporting period dated back to October 2007, the Beneficiary's concurrent employment with the discussed dental clinics is conspicuously absent from the labor

certification, while being included in the DOS nonimmigrant visa filed in October 2007 at the same time. Again, the Petitioner must resolve inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

In sum, the Beneficiary's bank records are not alone sufficient to substantiate her required 24 months of experience as a jewelry repairer abroad, particularly in light of the material discrepancies raised by her conflicting employment listed in the DOS nonimmigrant visa application. As such, the submitted evidence does not demonstrate that the Beneficiary had the required experience for the offered position. For this reason, we conclude that there was, and is, good and sufficient cause to revoke the approved petition.

ORDER: The petition is revoked.