U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-Y-M-, INC.

DATE: JAN. 23, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a meat and poultry distributor, seeks to employ the Beneficiary as a procurement specialist. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. 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 Director of the Nebraska Service Center initially approved the petition. Subsequently, the Director revoked the approval of the petition, concluding that the record did not establish that the Beneficiary possessed the experience required by the labor certification.[1] We dismissed a subsequent appeal. The matter is now before us on a motion to reopen.

On motion, the Petitioner asserts that the Beneficiary has two years of experience in the offered job as required by the labor certification. Upon review, we will deny the motion to reopen.

I. MOTION REQUIREMENTS

A petitioner must show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1). A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2).

[1] After granting a petition, U.S. Citizenship and Immigration Services (USCIS) may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Good and sufficient cause exists to issue a notice of intent to revoke (NOIR) where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

II. THE BENEFICIARY'S EXPERIENCE

The Director revoked the petition's approval because the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date.[2] A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

In this case, the labor certification requires 24 months of experience as a procurement specialist. The duties of the offered job are: "Prepare purchasing orders; determine inventory need and purchase meat products accordingly for wholesale; contact suppliers to schedule deliver [*sic*]; track all purchase orders and confirm timely delivery."

On the labor certification, the Beneficiary attested that he gained the requisite experience as a full-time procurement specialist for a furniture manufacturer in South Korea, from August 1, 2003, to July 31, 2005. His job duties were described as follows: "Prepared purchasing orders; determined inventory need and purchased materials for manufacturing furniture according to amount of inventory; contacted suppliers to schedule delivery; tracked all purchase orders and confirmed timely delivery."

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3).

With the petition, the Petitioner submitted a Korean "Certificate of Work Experience" dated July 27, 2014, from chief executive officer (CEO) of together with English translation.[3] The certificate stated that employed the Beneficiary full-time as a procurement specialist from August 1, 2003, to July 31, 2005. His job duties were described as follows: "prepared purchasing orders; determined inventory need and purchased materials for manufacturing furniture according to amount of inventory; contacted suppliers to schedule delivery; tracked all purchase orders and confirmed timely delivery."[4]

In the NOIR, the Director noted that in 2008, the Beneficiary filed an application for a U.S. nonimmigrant visitor's visa that omitted his employment with . On the 2008 visa application, the Beneficiary stated his "present occupation" as "evangelist." When asked to identify his prior two

[2] The priority date of a petition is the date the U.S. Department of Labor (DOL) accepted the labor certification for processing, which in this case is February 23, 2015. *See* 8 C.F.R. § 204.5(d).

[3] The certificate was translated by who also translated the other Korean documents submitted with the petition, with the Petitioner's response to the NOIR, and on appeal.

[4] The job description provided in the letter is nearly identical to the job duties listed for the offered position on the labor certification, which casts doubt on the veracity of the Beneficiary's claimed employment. The Petitioner must resolve any inconsistencies with independent, objective evidence of the Beneficiary's prior employment. *See Matter of Ho*, 19 I&N Dec. at 591-92.

employers, he stated: "None." The Beneficiary's omission of [redacted] as a prior employer on his nonimmigrant visa application casts doubt on his claimed, qualifying experience for the offered position and the requested classification. *See Matter of Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). Thus, good and sufficient cause existed to issue the NOIR because the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *See Matter of Estime*, 19 I&N Dec. at 451.

In response to the NOIR, the Beneficiary stated in an affidavit that he misunderstood the 2008 nonimmigrant visa application, assuming that it sought information only about "post-college experiences." He asserted that because he was on leave from school while working for [redacted] he omitted that employment from the visa application. However, the Beneficiary's 2008 nonimmigrant visa application indicated that he attended [redacted] from 2001 to 2007. It did not indicate any periods of leave from the university, and the record does not contain any documents from the university evidencing the Beneficiary's dates of attendance.

Further, the record also contains the Beneficiary's 2009 application for a U.S. nonimmigrant student visa. Like the 2008 visa application, the 2009 application omitted the Beneficiary's employment with [redacted]. The 2009 visa application listed the Beneficiary's employment with [redacted] in South Korea from September 2006 to December 2008. It also listed his attendance at [redacted] from February 2001 to February 2008. It did not indicate any periods of leave from the university. If the Beneficiary assumed that the nonimmigrant visa applications sought information only about post-college work, it is not clear why he included information about employment starting in 2006, but not his purported employment with [redacted] starting in 2003. Both employment experiences started during his claimed period of attendance at [redacted] Thus, his explanation for the omission of his [redacted] employment is not credible.[5] USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The NOIR also requested copies of South Korean tax records to confirm the Beneficiary's claimed experience. However, in a new affidavit dated July 17, 2017, [redacted] President of [redacted] stated that tax records of the Beneficiary's employment do not exist because the company paid him in cash and did not withhold any taxes from his pay.[6] The affidavit stated that the Beneficiary was

[5] A Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

[6] The prior certificate from the CEO of [redacted] was written in Korean and translated into English. The new affidavit, which appears to be written by the same individual despite a different title, is written in English. It appears to be a translation of a Korean document, but the original Korean document was not provided to the record. Without the foreign language document, we cannot determine whether the translation is correct. *See* 8 C.F.R. § 103.2(b)(3). A petitioner bears the burden of establishing 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).

employed full-time as "buying staff"[7] and that he was paid "KRW 2,100,000 a month from August 1, 2003 to July 31, 2005." The Beneficiary also asserted in his affidavit that he was not required to pay income taxes because he did not earn enough money.[8]

In response to the NOIR, the Petitioner also submitted undated copies of an employee record and wage confirmation sheets for the Beneficiary, and a business license for . The employee record states that the Beneficiary earned 2,100,000 won annually as staff in the procurement office of an unnamed employer. The wage confirmation sheets list monthly wages purportedly earned by the Beneficiary between August 2003 and July 2005. In the notice of revocation, the Director determined that the Petitioner had not established that the Beneficiary had the required two years of experience as a procurement specialist, as it did not overcome the inconsistencies in the record with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92. She noted that the employee record doesn't name the employer and the wage confirmation sheets are not fully translated. She therefore revoked the approval of the petition.

On appeal, the Petitioner asserted that the Director erred in discounting its evidence as not credible. It stated that the evidence submitted in response to the NOIR resolved the inconsistencies noted by the Director. In our decision, we determined that the record lacks sufficient, independent, objective evidence to establish the Beneficiary's claimed experience. *Id.* We stated that many of the submitted materials are unreliable. For example, we noted that undated copies of an employee record and wage confirmation sheets from do not establish their preparations during the Beneficiary's employment. We stated that the record lacks contemporaneous evidence of the Beneficiary's claimed employment, such as copies of his bank account statements showing deposits during his purported tenure as a procurement specialist.[9]

We further stated that the affidavit of President states a different company address than listed on the CEO's prior certificate and on the labor certification; business license states a third company address; and the employee record and wage confirmation sheets state another address. We indicated that the record does not explain the inconsistent company addresses. Further, we indicated that the affidavit of President stated that the company paid the Beneficiary 2.1 million won a month. However, the wage confirmation sheets indicate that it took about a year for the Beneficiary to earn that much. We noted that these unresolved inconsistencies further undermine the reliability of the Petitioner's evidence. *Id.* at 591 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of its remaining evidence).

[7] This job title differs from the job title listed in the CEO's July 2014 certificate. *See Matter of Ho*, 19 I&N Dec. at 591-92.

[8] The record does not contain evidence supporting this assertion. A petitioner must establish that it meets each eligibility requirement by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 375-76.

[9] Evidence that a petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Independent and objective evidence is contemporaneous with the event to be proven and existent at the time of the initial decision.

We also determined that the record does not establish the qualifying nature of the Beneficiary's claimed experience. The labor certification requires experience in the job offered, which means experience performing the job duties of the offered position. *See, e.g., Matter of Sumeru Inc.*, 2013-PER-01241 (BALCA Apr. 24, 2017). We found that the Beneficiary did not have experience purchasing meat products for wholesale; instead, he claimed to have bought materials for manufacturing furniture. On the labor certification, the Petitioner specified that it would not accept experience in an alternate occupation. Thus, we found that the record does not establish the Beneficiary's experience in the job offered. Finally, we also stated in our decision that the Petitioner must demonstrate its continuing ability to pay the proffered wages of all of its pending petitions.

On motion to reopen, the Petitioner states that the wage confirmation sheets were prepared contemporaneously with the Beneficiary's claimed employment, and that the Beneficiary confirmed his receipt of cash payments by executing his signature at the end of each month. Thus, the Petitioner asserts that the wage statements are reliable evidence of the Beneficiary's employment. We disagree. The signatures on the wage confirmation sheets do not match the Beneficiary's signature on the labor certification, and thus, they are not credible evidence of the Beneficiary's prior employment. Further, the Petitioner has provided no evidence to corroborate that the wage confirmation sheets were prepared contemporaneously with his purported employment at

The Petitioner also asserts that the employee record was prepared contemporaneously with the Beneficiary's claimed employment, as "it was the company's personnel record which was prepared and completed when the Beneficiary joined the company." However, the Petitioner provides no corroborating evidence to support this assertion, such as evidence of other similar personnel records for other employees.

Regarding the affidavit of President which stated that the Beneficiary earned 2,100,000 won per month, the Petitioner claims that a "clerical mistake... occurred when the previous affidavit, drafted in the Korean language, was translated into English." The President asserts that he "assumed the translation was correct and executed his signature to verify its accuracy." However, as previously noted, the original Korean document was not provided and, therefore, we cannot determine the accuracy (or inaccuracy) of the translation.

Regarding the different addresses, the Petitioner explains on motion that some of the discrepancies relate to a law implemented in South Korea that changed the address system. It states that the business license and wage confirmation sheet were prepared under the old address system, and the labor certification and certificate of work experience were prepared under the new address system. It further states that the address listed on the affidavit of the President contains his residential address, and that the affidavit was mistranslated to indicate it was the business address. The Petitioner provides evidence showing that it is the President's current residential address. While the explanation regarding the change of address system appears valid, the existence of another mistranslated document lessens the credibility of the other translated documents in the record.[10]

[10] Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence

Further, the Petitioner states that to gain experience in the offered job, the Beneficiary was not required to gain that experience in the same industry as a meat purchaser. Instead, the Petitioner asserts that the duties performed by the Beneficiary were substantially similar to the duties of the offered job. The Petitioner distinguishes the holding in *Matter of Sumeru* from the facts of this case. The Petitioner also submits the O*Net[11] job description and indicates that the essential skills and knowledge needed for the offered job are not industry-specific and do not involve any knowledge related to products and services. Thus, the Petitioner asserts that the Beneficiary's claimed experience as a furniture procurement specialist qualifies him for the offered job of meat procurement specialist. We disagree. Because the Petitioner has not established by a preponderance of the evidence that the Beneficiary worked as a furniture procurement specialist at , we cannot conclude that the Beneficiary's purported duties at were substantially similar to the duties of the offered job.

The Petitioner has not resolved the inconsistencies and ambiguities in the record with independent, objective evidence of the Beneficiary's prior employment. *See Matter of Ho*, 19 I&N Dec. at 591-92. Thus, the Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date. The Beneficiary does not have the required two years of experience as a procurement specialist. We therefore deny the motion.

III. ABILITY TO PAY THE PROFFERED WAGE

We stated in our decision that the Petitioner must establish its continuing ability to pay the proffered wage. The proffered wage is $45,968 per year. The record must show the Petitioner's ability to pay the proffered wage from the priority date of February 23, 2015, onward.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The record contains the Petitioner's federal tax returns for fiscal years 2014, 2015, and 2016. They establish sufficient net current assets to pay the wages of the current Beneficiary and another beneficiary of a pending immigrant visa petition filed by the Petitioner. Thus, the Petitioner has established its continuing ability to pay the proffered wages of its pending petitions.

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submitted in support of the petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

[11] O*NET is the current occupational classification system in use by the DOL.

IV. CONCLUSION

Although the Petitioner has established its continuing ability to pay the proffered wage, the Petitioner has not demonstrated that the Beneficiary has the required experience for the offered job.

ORDER: The motion to reopen is denied.

Cite as *Matter of N-Y-M-, Inc.*, ID# 1852700 (AAO Jan. 23, 2019)