U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 04687776

DATE: JAN. 27, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a full service restaurant, seeks to employ the Beneficiary as a specialty chef. It requests skilled worker classification for the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based "EB-3" 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 denied the petition. The Director found that the Petitioner did not establish that the Beneficiary had the requisite experience to qualify for skilled worker classification under the law and to meet the terms of the labor certification.

On appeal the Petitioner asserts that the documentation of record establishes that the Beneficiary has the requisite experience for the requested visa classification, and that this experience meets the terms of the labor certification.

In visa petition proceedings it is the Petitioner's burden to establish eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. 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 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, the 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 domestic 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.

## II. ANALYSIS

To qualify for classification as a skilled worker a beneficiary must have at least two years of training or experience. 8 C.F.R. § 204.5(l)(3)(ii)(B). A beneficiary must also meet the specific educational, training, experience, or other requirements of the labor certification. *Id.* All requirements must be met by the petition's priority date,[1] which in this case is October 6, 2017. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

The labor certification that accompanied the Petitioner's Form I-140, Immigrant Petition for Alien Worker (I-140 petition), requires 24 months of qualifying experience as a chef or cook specializing in Korean cuisine. The labor certification lists one prior job for the Beneficiary as a chef at [redacted] in [redacted] South Korea, from July 1, 2012, to June 30, 2015. As evidence of the alleged employment the Petitioner submitted a letter (dated July 23, 2018) on the letterhead of [redacted] from [redacted] identified as the owner, stating that the Beneficiary worked for the restaurant as a full-time chef from September 10, 2013, to October 31, 2015. In a letter from counsel accompanying the petition the Petitioner asserted that the discrepancy in the dates of employment between the labor certification and the letter from [redacted] was due to the Beneficiary's faulty memory, and that the dates in [redacted]'s letter were correct.

The Director issued a request for evidence (RFE) to resolve the discrepancy regarding the Beneficiary's dates of employment with [redacted]. In its response to the RFE the Petitioner submitted another letter from [redacted] stating that he did not have any documentation of the Beneficiary's employment, but affirming that he worked in the restaurant as a chef from September 10, 2013, to October 31, 2015. Documentation was submitted showing that the Beneficiary took some culinary courses during the period of alleged employment at the restaurant, but no further documentation of the Beneficiary's employment was submitted.

The Director denied the petition, finding that the Petitioner did not resolve the evidentiary discrepancy concerning the Beneficiary's alleged employment with [redacted]. The Director concluded that the Petitioner did not establish that the Beneficiary had 24 months of full-time employment at the restaurant, as required to qualify for skilled worker classification under 8 C.F.R. § 204.5(l)(3)(ii)(B) and to meet the experience requirement of the labor certification.

On appeal the Petitioner submitted another letter from [redacted] and a statement from the [redacted] in Seoul bearing the signatures of 23 local merchants, including [redacted]. The [redacted] statement, consistent with the letters from [redacted], alleged that the Beneficiary was employed full-time by [redacted] from September 2013 to October 31, 2015, while studying at a local college, and that there were no official records of the Beneficiary's employment because he worked as a temporary rather than a permanent employee and without insurance.

We subsequently issued a notice of intent to dismiss (NOID) the appeal, stating that we had received a report from the consular section of the U.S. Embassy in Seoul, South Korea, which cast doubt on the

[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).

veracity of the [redacted] statement as a whole. The consular section contacted some of the 23 signatories by phone, not all of whom confirmed the Beneficiary's employment with [redacted] While the restaurant's owner, [redacted] (number 1 on the list) stated once again that he employed the Beneficiary, he said he was unable to recall the exact dates. The president of the federation (number 9 on the list) denied that he signed the statement on behalf of the Beneficiary. Conflicting information was provided by individual number 11 on the list, who stated that he was asked by the federation's president to sign the statement, even though he does not know the Beneficiary. Individual number 4 on the list stated that he did not know the Beneficiary or the owner of [redacted] Individuals number 3 and 19 on the list confirmed that they knew the Beneficiary and signed the statement, but were unable to provide his exact employment dates at the restaurant. Two other individuals (numbers 10 and 20 on the list) were unable to be contacted via the phone numbers provided on the [redacted] statement.

Due to these myriad inconsistencies, we advised the Petitioner that the [redacted] statement appeared to have little evidentiary weight. Citing *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988), we advised that it was incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence, that attempts to explain or reconcile such inconsistencies would not suffice without competent evidence pointing to where the truth lies, and that doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence.

In response to the NOID counsel to the Petitioner asserts that phone calls are not a reliable method of obtaining information due to the prevalence of voice "phishing" and spam calls in South Korea, which may mean that the individuals discussed above doubted that the calls they received were actually from the U.S. Embassy. According to counsel, the Petitioner's mother personally visited with each of the individuals discussed in our NOID and was told by each of them that the calls were received during morning hours when the merchants were opening for the day and extremely busy, and many thought they were receiving a spam call. According to counsel the Petitioner's mother received the following information from these individuals: [redacted]'s owner, [redacted], acknowledged once again that he could not remember the exact dates of the Beneficiary's employment, but asserts that his past statements on that issue were accurate. The [redacted] president, who previously denied signing the joint statement, now asserts that after seeing the document once again he remembers signing it. Individual number 11, who previously claimed that he signed the [redacted] statement at the behest of its president despite not knowing the Beneficiary, now asserts that "he was asleep when he received a call." Individual number 4, who previously stated that he did not know the Beneficiary, asserts that he was busy when he received the call from the U.S. Embassy, hung up quickly, made a return call shortly thereafter to confirm that the prior call came from the U.S. Embassy, but did not receive a call back from the Embassy. Individuals number 3 and 19, as previously, confirmed that they know the Beneficiary and signed the [redacted] statement, but could not remember the exact dates of the Beneficiary's employment at [redacted] Finally, individuals 10 and 20, whom the U.S. Embassy had been unable to contact at the phone numbers provided in the [redacted] statement, asserted that "[t]hey do not remember receiving any call from a consulate." The Petitioner claims that the foregoing information from the contacted individuals is sufficient to warrant a finding that the Beneficiary was employed by [redacted] from September 2013 to October 2015. We do not agree.

The information obtained by the Beneficiary's mother from the referenced individuals, as relayed by the Petitioner in counsel's response to the NOID, is not supported by any personal statements from those individuals. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Nor does the new information allegedly obtained from the referenced individuals eliminate all of the inconsistencies identified in our NOID. Therefore, the evidentiary shortcomings of the [redacted] statement as originally submitted have not been overcome. Furthermore, there is still no primary evidence of the Beneficiary's alleged employment by [redacted] such as tax or payroll records, earnings statements, or any other employment-related documentation between [redacted] and the Beneficiary contemporaneous with the period of alleged employment in the years 2013-2015.

Additionally, we note two other adverse factors. The Petitioner submitted with the I-140 petition the Beneficiary's most recent I-94 (admission/departure) record issued by U.S. Customs and Border Protection. The second page of the I-94 document shows that the Beneficiary's was admitted to the United States [redacted], on September 10, 2013, the same date he claims to have begun working for the restaurant in Korea, and that he departed the United States on December 6, 2013. Even if we accepted the experience verification letter from [redacted] as true and correct, which we do not, the three-month gap in the Beneficiary's employment at the restaurant would result in less than two years of qualifying experience. Also, the Beneficiary completed a nonimmigrant visa application on October 8, 2015, near the end of his purported employment with [redacted], in which he answered "No' to the question of whether he had previously been employed. Both of these factors cast significant doubt on the Beneficiary's alleged employment at the restaurant in South Korea.

As previously indicated, the burden is on the petitioner in visa petition proceedings to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). To meet this burden, the petitioner must prove by a preponderance of evidence that it and the beneficiary are qualified for that benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The "preponderance of the evidence" standard requires that the evidence demonstrate that the petitioner's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Id.* (quoting *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

In accord with our foregoing analysis, we conclude that the Petitioner has not met its burden of proof in this case. Based on the documentation of record, we find that the Petitioner has not established by a preponderance of the evidence that the Beneficiary was employed by [redacted] as a chef for at least two years before the priority date of October 6, 2017, as required to qualify for skilled worker classification and to meet the terms of the labor certification.

## III. CONCLUSION

The Petitioner has not established that the Beneficiary had at least two years of qualifying experience by the priority date. Therefore, the Beneficiary does not qualify for classification as a skilled worker and does not meet the requirements of the labor certification. The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision.

**ORDER:** The appeal is dismissed.