U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12964820

Date: JAN. 29, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a tailor. It requests classification of the Beneficiary as a skilled worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This immigrant visa category 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 education, training, or experience.

The Director of the Texas Service Center revoked the approval of the petition, concluding that the Petitioner did not establish that the Beneficiary possessed the required experience for the offered position.

The Petitioner bears the burden of establishing eligibility for the requested immigration benefit. See section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will withdraw the Director's decision and remand the appeal for the issuance of a new decision.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant visa category, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2); Matter

of Wing's Tea House, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). In this case, the priority date is October 19, 2016.[1]

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. REVOKING THE APPROVAL OF AN IMMIGRANT VISA PETITION

USCIS may revoke its prior approval of an immigrant visa petition "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. Revocations that do not meet the definition of an automatic revocation under 8 C.F.R. § 205.1 may be made only after issuing a notice of intent to revoke the approval of the petition (NOIR). The NOIR provides the petitioner the opportunity to submit evidence in support of the petition and in opposition to the alleged grounds for revocation. 8 C.F.R. § 205.2(b). A NOIR is issued for "good and sufficient cause" if the record of proceeding at the time of issuance would warrant the denial of the petition. Matter of Estime, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, the approval of the petition is properly revoked if the record (which includes any response to the NOIR) warrants the denial of the petition. Id. at 452; see also Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (the realization by the director that the petition was approved in error may be good and sufficient cause for revoking its approval). If the petition approval is revoked, the petitioner must be provided with a written decision that explains the specific reasons for the revocation. 8 C.F.R. § 205.2(c). Petitioners may appeal revocations on notice to the AAO. See 8 C.F.R. § 205.2(c).

III. EXPERIENCE

At issue in this case is whether the Beneficiary possessed two years of experience as a tailor by the October 19, 2016 priority date. A beneficiary must possess all of the required education, training, and experience for the offered position as set forth on the labor certification by the priority date of the petition. See Matter of Wing's Tea House, 16 I&N Dec. at 160. USCIS examines the job offer portion of the labor certification to determine a position's minimum requirements. We may neither ignore a term on the labor certification nor impose additional requirements. See Madany v. Smith, 696 F.2d 1008, 1015 (D.C. Cir. 1983).

Here, section H.6 of the labor certification states that the offered position of tailor requires two years of experience. Section H.10 states that experience in an alternate occupation is not acceptable. No education, training, or specific skills are required. Section K of the labor certification states that the Beneficiary gained her qualifying experience as a self-employed tailor in [redacted] Vietnam from September 1, 2015 until the filing of the labor certification; and as a tailor at a tailor shop in [redacted] Vietnam from June 10, 2012 until August 1, 2015. The labor certification states that the Beneficiary worked 40 hours per week in each position. In support of this claimed experience, the petition contains an employment experience letter from the tailor shop where the Beneficiary

[1] For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d).

purported to work, stating that the Beneficiary was employed as a tailor from June 1, 2012 until August 1, 2015. After reviewing the record, the Director approved the petition.

Following the Beneficiary's immigrant visa interview there were questions about whether the Beneficiary's self-employment as a tailor was full-time (contradicting her claim of full-time employment on the labor certification); and the Beneficiary's employment experience letter from the tailor shop did not specify whether she was a full-time, part-time, or seasonal employee. Based on these issues, the Director issued a notice of intent to revoke the approval of the petition (NOIR). The NOIR noted that the experience letter submitted with the petition did not describe the duties of the position and did not state that the employment was full-time and therefore did not meet the requirements for experience letters set forth at 8 C.F.R. § 204.5(l)(3)(ii)(A). The NOIR also noted that the Beneficiary was unable to establish that her self-employment as a tailor was on a full-time basis.[2]

The Director then revoked the approval of the petition. The notice of revocation (NOR) stated that the Director did not receive any response to the NOIR and concluded that the Petitioner failed to establish that the Beneficiary possessed the required experience as a tailor.

On appeal, the Petitioner claimed that it had timely submitted a response to the NOIR. The record contains evidence that the NOIR response was delivered to the Texas Service Center within the allotted time period. The record also contains the Petitioner's NOIR response. The response contains a second employment letter that the Petitioner claims resolves the deficiencies noted in the NOIR and NOR. The Petitioner declined to submit evidence relating to the Beneficiary's self-employment as a tailor, deeming it unnecessary because the claimed experience with the tailor shop exceeded two years.

Since the Director has not had an opportunity to review this new evidence, we are remanding this matter to the Director to determine whether or not the document establishes that the Beneficiary has the required experience for the offered position. We note that the new employment letter is in English and was not translated from Vietnamese. It also appeared to be written by counsel (including the letterhead of the tailor shop) as it is written in the same format and style as counsel's brief and cover letter. As the letter is not in Vietnamese with an English translation, it's not clear from the record that the author would fully understand the full untranslated contents of the letter. Regarding the Beneficiary's claimed self-employment, unresolved inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Matter of Ho, 19 I&N Dec. at 591-92. On remand, the Director should also request updated evidence of the Petitioner's ability to pay the proffered wage.[3]

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[2] The Director's NOIR was properly issued for "good and sufficient cause" as it raised at least one potential ground for revocation that, if unrebutted, would warrant the denial of the petition. See Matter of Estime, 19 I&N Dec. at 451. Specifically, the NOIR stated that the Petition did not establish that the Beneficiary possessed the claimed experience for the offered position.

[3] The Petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the Beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

III. CONCLUSION

We are remanding the Director's decision to revoke the approval of the immigrant visa petition in order to consider the evidence submitted by the Petitioner in response to the NOIR.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.