U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12283150

Date: JAN. 29, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a solar panel sales and installation business, seeks to employ the Beneficiary as a solar photovoltaic installer. 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 denied 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 dismiss the appeal.

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). 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). In this case, the priority date is June 21, 2019.

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. EXPERIENCE

At issue in this case is whether the Beneficiary possessed the required experience for the offered position by the June 21, 2019 priority date. 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 solar photovoltaic installer position requires two years of experience in the offered position. Experience in an alternate occupation is not acceptable. The labor certification does not require any education, training, or specific skills.

Section K of the labor certification states that the Beneficiary was employed by [redacted] as a solar energy technician from May 15, 2006 to June 30, 2015, working 45 hours per week.[1] The record contains an employment experience letter from [redacted] which states that the Beneficiary worked for the company as an apprentice from 2006–2008, as a solar energy technician from 2008–2012, and in the position of "project interpretations" from 2012–2015.[2] Therefore, at the outset there is an inconsistency between the experience letter and the labor certification regarding the Beneficiary's position(s) with [redacted] and the experience letter also does not state how many hours per week that the Beneficiary worked for the company.

After reviewing the petition, the Director issued a request for evidence (RFE). The RFE noted that a nonimmigrant visa application filed by the Beneficiary in 2014 stated that he was currently employed at [redacted] as a sales consultant and was previously employed at [redacted] as an administrative agent. The RFE informed the Petitioner that the nonimmigrant visa application did not list any current or prior employment experience with [redacted] or as a solar photovoltaic installer. The RFE instructed the Petitioner to address the inconsistencies between the petition and the nonimmigrant visa application regarding the Beneficiary's claimed employment experience. Specifically, the Director requested an explanation of the discrepancy as well as independent, objective evidence to support the explanation such as official tax or employment records.

The Petitioner's RFE response contained a new employment letter from the [redacted] stating that the Beneficiary worked as a subcontractor and that all payments were made to the contractor who was responsible for paying the Beneficiary; a document purportedly acknowledging the receipt of 12,000 Brazilian real by [redacted], for services rendered from December 2014 to February 2015; and a statement from the Beneficiary that he did not have a regular workload while working for [redacted] but instead worked on a project-to-project basis as a contractor. The Beneficiary also claimed that he did not include his solar photovoltaic installer experience on the

[1] This decision does not address whether the solar energy technician position is in the same occupation as the offered position of solar photovoltaic installer.
[2] This is how the Petitioner's translator translated the Portuguese term interpretação de projeto into English.

nonimmigrant visa application because the application form did not have a place to put a second job.

The Director's decision denying the petition found that the RFE response did not adequately resolve the inconsistencies in the record regarding the Beneficiary's claimed experience and concluded that the Petitioner did not establish that the Beneficiary possessed at least 24 months of experience as a solar photovoltaic installer.

On appeal, the Petitioner reiterates its claims on the RFE response. The appeal also contains a new letter from the owner of the Petitioner, claiming that when the Petitioner hired the Beneficiary, it verified the Beneficiary's experience directly with [redacted].[3]

When, as in this case, there are inconsistencies or discrepancies in the record relating to a beneficiary's eligibility for the requested immigration benefit, the petitioner must resolve them with independent, objective evidence pointing to where the truth lies. See Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Id.

The labor certification states that the Beneficiary was employed by [redacted] as a solar energy technician from May 15, 2006, to June 30, 2015, working 45 hours per week. The employment verification letter from [redacted] instead states that the Beneficiary worked for the company in three different positions and does not state the hours worked per week. When the Director notified the Petitioner that this claimed employment was not listed on the Beneficiary's 2014 nonimmigrant visa application, the Petitioner claimed that the Beneficiary changed from an employee of [redacted] to an independent contractor; that this solar technician work was not the Beneficiary's primary employment; that the nonimmigrant visa application did not have a space to put a second job; and that the Beneficiary's hours were sporadic based on the specific project. In short, the Petitioner's characterization of the Beneficiary's experience changed substantially once presented with the details of the Beneficiary's nonimmigrant visa application. And contrary to the Petitioner's assertions, the second employment letter from [redacted] does not claim that the Beneficiary was ever an employee of the company. Instead, the letter states that the Beneficiary worked for a third-party contractor. Further, the document that the Petitioner submitted with its RFE response for the receipt of 12,000 Brazilian real by [redacted], also does not resolve the inconsistency because the receipt only covers a three-month period and it does not specify what services were provided by the Beneficiary.[4]

For these reasons, we conclude that the Petitioner has not resolved the multiple inconsistencies in the record of proceeding relating to the Beneficiary's claimed qualifying employment experience. Therefore, the submitted evidence does not establish that the Beneficiary possessed two years of experience as a solar photovoltaic installer by the priority date of the petition.

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[3] Our decision in this case is limited to the evidence in the record at the time of the Director's unfavorable decision. See Matter of Soriano, 19 I&N Dec. 764 (BIA 1988); Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988). The Petitioner should have provided this letter with the RFE response. Even if we considered this letter on appeal, it would not have changed our decision.

[4] There is a website for a company named [redacted] which appears to specialize in sanitation and in the construction of tanks for the storage of water, sewage, chemicals, and other products.

III. CONCLUSION

We affirm the Director's conclusion that the Petitioner has not established that the Beneficiary meets the minimum requirements of job offered as set forth on the labor certification.

ORDER: The appeal is dismissed.