U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 09184666

DATE: JULY 6, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, tobacco store, seeks to employ the Beneficiary as retail manager. 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 Texas Service Center denied the petition on the ground that the Petitioner did not establish that the Beneficiary had the requisite experience to meet the terms of the labor certification and to qualify for skilled worker classification.

On appeal the Petitioner submits a brief and additional documentation, and asserts that the evidence establishes that the Beneficiary has the requisite experience to meet the terms of the labor certification and qualify for skilled worker classification.

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

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states that to qualify for skilled worker classification:

> . . . the petition must be accompanied by evidence that the [beneficiary] meets the educational, training or experience, and any other requirements of the individual labor certification . . . . The minimum requirements for this classification are at least two years of training or experience.

To be eligible for skilled worker classification, therefore, the Beneficiary must meet the specific requirements of the labor certification and have at least two years of relevant experience (or training). All requirements must be met by the petition's priority date,[1] which in this case is November 1, 2018. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

In this case section H of the labor certification (Job Opportunity Information) specifies the following with respect to the requirements for the job of retail manager:

4.	Education: Minimum level required:	None
5.	Is training required for the job?	No
6.	Is experience in the job offered required?	Yes
6-A.	How long?	24 months
8.	Is an alternate combination of education and experience acceptable?	No
10.	Is experience in an alternate occupation acceptable?	Yes
10-A.	How long?	24 months
10-B.	Acceptable alternative occupation:	Management
14.	Specific skills or other requirements:	None

Thus, the labor certification requires two years of experience as a retail manager or in a related management occupation to qualify for the proffered position. In sections J and K of the labor certification the Beneficiary claimed that he gained the experience required in section H by working at [redacted] a wireless retail business in [redacted] Texas, beginning on September 1, 2015. The Beneficiary's job title is identified as owner/member/manager.

As evidence of the Beneficiary's experience the Petitioner submitted a letter from "[redacted], Officer," on the letterhead of [redacted], and dated September 15, 2018. The letter stated that the Beneficiary had "been Associate with company as Owner / Member / Manager since Sept. 1, 2015," and describing his job duties. Aside from identifying himself as an "officer" [redacted] did not provide any details about his connection with [redacted]

The Director issued a request for evidence (RFE) in which the Petitioner was requested to submit additional evidence of the Beneficiary's qualifying experience. The Petitioner responded with another letter from [redacted] on the letterhead of [redacted] dated August 8, 2019, in which he asserted that the Beneficiary worked full-time in the business and provided a more detailed listing of his job duties, identified himself once again as an officer without further details, and provided a telephone number where he could be contacted.

[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).

The Director denied the petition, noting that the author of the employment verification letter from [redacted] still had not identified his position or job title with the company in conformance with the regulation at 8 C.F.R. § 204.5(g)(1), which provides that:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address and **title of the writer**, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered [emphasis added].

The Director also indicated that a USCIS officer had telephoned [redacted] on September 4, 2019, at the number stated in his previous letter, and provided transcriptions of the two conversations the USCIS officer had with [redacted] that day. According to the transcriptions [redacted] confirmed that the Beneficiary was "my friend and associate" and, in answer to the question of whether the Beneficiary's position was full-time or part-time, stated that "he only work[s] part-time." When the USCIS officer asked whether he could speak with the Beneficiary, [redacted] stated in the first phone call that the Beneficiary was not there and in the second phone call he indicated that neither he nor the Beneficiary was in the office. The USCIS officer asked for the Beneficiary's phone number, but according to information in the Director's decision was put on hold by [redacted] and ultimately cut off without receiving the phone number. Based on the evidence of record the Director concluded that the Petitioner did not establish that the Beneficiary had at least two years of qualifying experience by the priority date of November 1, 2018.

On appeal the Petitioner submits an affidavit from the Beneficiary stating that he is the owner/manager of [redacted] in [redacted] Texas, that the business is primarily engaged in wireless retail, and that he has worked full-time in the business since September 1, 2015. The Petitioner also submits an affidavit from [redacted] supplementing his two previous letters, stating for the first time that he owns a tax service franchise, [redacted] in [redacted] Texas, and since 2015 has handled "the financial aspect of the [Beneficiary's] business such as preparing and filing the tax returns." [redacted] states that "I prepared [the Beneficiary]'s experience letter" (without specifying which one) and asserts that when the USCIS officer called on September 4, 2019, he was unable to transfer the call because he was home taking care of his wife's health problem, that he was confused by the questions he was asked, that he wanted to clarify that the Beneficiary works full-time in his business, that he was at his office when the second call came, that the Beneficiary was unavailable then, and that after "some disturbance in the call" he tried to call the USCIS officer back, but did not get through. The Petitioner also submits an affidavit from [redacted] the owner of a candy store located next to [redacted] who states that she has known the Beneficiary since his business opened in 2015 and that the Beneficiary works full-time in his business.

In addition to the above affidavits the Petitioner submits copies of the Beneficiary's individual income tax returns (Forms 1040) for each of the years 2015, 2016, and 2017. Each of the returns identified [redacted] of [redacted] as the paid preparer. Each of the returns contains a

[2] In his two prior letters [redacted] spelled his first name [redacted]

Schedule C (Profit or Loss from Business) which identified the Beneficiary as the owner of the "cell phone" business [redacted] listed the income and expense items of the business, and recorded small net profits for each year. The returns also include small sums for "wages, salaries, tips, etc." earned by the Beneficiary each year, as well as larger sums for business income generated from the Beneficiary's ownership interest in another company, [redacted] documented in Schedule E. The Petitioner submits a copy of a separate 2018 tax return for [redacted] (Form 1120S, U.S. Income Tax Return for an S Corporation) recording its income and expense items and a modest net profit for the year.

The information in the tax returns indicates that the Beneficiary derived income from various sources in the years 2015-2018 and amplifies the question first raised in the inconsistent statements of [redacted] of whether the Beneficiary actually works full-time in his [redacted] business and, if not, whether he gained the requisite experience before the priority date to meet the terms of the labor certification and qualify for classification as a skilled worker. [redacted] has not explained why he stated in response to the RFE that the Beneficiary works full-time for [redacted] changed his story on the phone by telling the USCIS officer that the Beneficiary works only part-time at [redacted], and then reversed himself again on appeal by asserting that the Beneficiary works full-time for [redacted]. Nor has [redacted] explained why he was confused by the questions he was asked by the USCIS officer, since he had expressly provided his telephone number to USCIS for the purpose of providing further details about the Beneficiary's work with [redacted].[3] Furthermore, the Petitioner has provided no details about the Beneficiary's other sources of income recorded in his individual tax returns, how much time he expends in those work activities, and how much time is left to run his business at [redacted]. In sum, while the labor certification asserts that the Beneficiary's work with [redacted] is a full-time job (40 hours per week), [redacted] contradicted that document at one point by stating that the work was only part-time, and the record does not make clear how much time, and what percentage of a typical workday, the Beneficiary actually expends performing job duties for, and gaining management experience with, [redacted]

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.*

For the reasons discussed above, we conclude that the Petitioner has not resolved the inconsistent information it has provided about the Beneficiary's experience with [redacted] Therefore, the Petitioner has not established that the Beneficiary gained at least two years of qualifying experience by the priority date of November 1, 2018, as required to meet the terms of the labor certification and to qualify for skilled worker classification.

[3] In addition, [redacted] has not explained why he identified himself as an "officer" of [redacted] in his first two letters but in his subsequent affidavit identified himself as the company's tax preparer and claimed no other relationship with the company.

III. CONCLUSION

The Petitioner has not established that the Beneficiary had at least two years of qualifying experience for the job offered by the priority date. Therefore, the Beneficiary does not meet the experience requirement of the labor certification and does not qualify for classification as a skilled worker. 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.