U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31841431

Date: JULY 8, 2024

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a costume jewelry importer, seeks to employ the Beneficiary as a marketing specialist. The company requests his classification under the employment-based, third-preference (EB-3) immigrant visa category as a "skilled worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). Businesses may sponsor noncitizens for permanent residence in this category to work in jobs requiring at least two years of training or experience. *Id.*

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that, on the accompanying certification from the U.S. Department of Labor, the Petitioner willfully concealed its incorporation by the Beneficiary's sister. On appeal, we withdrew the misrepresentation finding but remanded the matter for investigation of other evidentiary inconsistencies. *See In Re: 10572221* (AAO Feb. 16, 2021).

On remand, after issuing a new notice of intent to revoke (NOIR) the petition and considering the Petitioner's response, the Director again revoked the filing's approval. The Director concluded that, at the time of the petition's approval, the Petitioner had not demonstrated the Beneficiary's satisfaction of the offered job's minimum experience requirements or the company's ability to pay the job's proffered wage. We dismissed the Petitioner's second appeal and following two motions to reconsider. *See In Re: 29207563* (AAO Dec. 6, 2023). Our decisions affirmed the Director's finding of insufficient evidence of the Beneficiary's claimed qualifying experience. *Id.* We reserved consideration of whether the company demonstrated its ability to pay the proffered wage. *Id.*

The matter returns to us on the Petitioner's third motion to reconsider. The company contends that we disregarded independent, objective evidence of the Beneficiary's claimed qualifying experience. In these revocation proceedings, the Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we conclude that the company has not established our prior misapplication of law or policy, or the Beneficiary's eligibility for the offered job. We will therefore dismiss the motion.

I. LAW

A motion to reconsider must demonstrate that our prior decision misapplied law or U.S. Citizenship and Immigration Services (USCIS) policy based on the evidence at the time of the decision. 8 C.F.R. § 103.5(a)(3). The scope of our review on motion is limited to our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

II. ANALYSIS

A. The Required Experience

To demonstrate the Beneficiary's qualifying experience for the offered job, the Petitioner must establish that, by the petition's March 24, 2016 priority date, the Beneficiary had at least four years' experience "in consumer marketing and sales in the fashion jewelry industry." *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring "evidence that the [noncitizen] meets the educational, training or experience, or any other requirements of the individual labor certification"); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977) (barring a beneficiary from gaining qualifying education or experience after a petition's priority date). The company must also establish the Beneficiary's "experience with market data segmentation and analysis." *Id.*

The Petitioner's initial filing included a 2016 letter from the general manager of the Beneficiary's purported former employer in South Korea. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring letters from former employers as proof of beneficiaries' claimed qualifying experience). Consistent with the information on the accompanying labor certification, the letter states the company's employment of the Beneficiary as president from May 2005 to May 2013 and describes his job duties, including his purported performance of market data segmentation and analysis.

The Director's most recent NOIR, however, noted inconsistent evidence of the Beneficiary's claimed qualifying experience. U.S. government records show that, on a May 2013 application for a U.S. nonimmigrant visa, the Beneficiary listed a Chinese company as his then-current employer. He also stated that he worked for a Hong Kong company from October 2005 to March 2009. He listed his employment with the South Korean company indicated on the labor certification. But, whereas he listed his employment with the company on the labor certification from May 2005 to May 2013, his nonimmigrant visa application states his employment with the business from May 2009 to February 2013. A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On motion, the Petitioner contends that the Beneficiary "has owned and operated numerous companies in the jewelry trade industry in South Korea, Hong Kong, China, and in [the] USA for more than 20 years as evidenced by the submitted documents." The company argues that copies of business registration documents of the three foreign companies listed on the Beneficiary's visa application demonstrate his qualifying experience. The company states that the documents are independent, objective evidence because government entities issued them. The Petitioner contends that the documents "giv[e] material weight and credibility to [the] Beneficiary's previous work experience." The company states: "Given the Beneficiary's career-long professional experience in the jewelry trade

industry as proven by evidence submitted, the Beneficiary's employment experience in the job offered is more probable than its nonexistence."

The business registration documents constitute independent, objective evidence. But they do not corroborate the Beneficiary's claimed qualifying experience. The documents identify him as the owner or president of the three companies listed on the 2013 visa application. But the documents do not indicate his employment dates or job duties with the businesses. The documents also do not show that the Chinese and Hong Kong businesses operated in the jewelry trade industry. The documents therefore do not demonstrate that, by the petition's priority date, the Beneficiary had at least four years' experience "in consumer marketing and sales in the fashion jewelry industry," including "experience with market data segmentation and analysis." The business registration documents also do not explain why his 2013 visa application lists a different employment history than the labor certification and the employment letter from his purported former South Korean employer. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record).

Counsel states that, "[d]ue to the lapse of time, the Beneficiary is physically unable to obtain any additional evidence to support his employment experience." *See* 8 C.F.R. § 204.5(g)(1) (stating that, if letters from former employers are unavailable, "other documentation relating to the [noncitizen]'s experience . . . will be considered").

Counsel's statement, however, is not evidence. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("[S]tatements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight.") The Petitioner therefore has not established the unavailability of regulatory required letters from the Beneficiary's purported former employers.

The Petitioner also contends that, because the Beneficiary worked for two years in E-2 nonimmigrant visa status for a U.S. company that he listed on the labor certification, the Petitioner need only demonstrate his possession of two additional years of qualifying experience. *See* section 101(a)(15)(E) of the Act, 8 U.S.C. § 1101(a)(15)(E) (authorizing the temporary admission of noncitizens under treaties of commerce and navigation between the United States and their foreign states of nationality). The company argues that the Beneficiary "has already verified employment experience from [the U.S. company] pursuant to his previously valid E-2 status from June 10, 2013 through June 30, 2015."

USCIS records indicate the Beneficiary's U.S. admissions in E-2 visa status during the specified period. But, contrary to the regulatory requirement for immigrant visa petitions, the Petitioner has not provided a letter from his purported E-2 employer stating his title and duties during that period. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The company therefore has not demonstrated that the Beneficiary gained two years of qualifying experience with the U.S. company.

The Petitioner has not established the Beneficiary's qualifying experience. We will therefore affirm our appellate dismissal.

B. Ability to Pay the Proffered Wage

Our finding regarding the Beneficiary's qualifying experience resolves this motion. We need not reach and therefore continue to reserve consideration of the Petitioner's ability to pay the offered job's proffered wage. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies need not make "purely advisory findings" on issues unnecessary to their ultimate decisions); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where the applicant did not otherwise meet their burden of proof).

III. CONCLUSION

The Petitioner's motion to reconsider does not establish our prior misapplication of law or policy, or the Beneficiary's eligibility for the requested benefit. We will therefore affirm our appellate dismissal.

ORDER: The motion to reconsider is dismissed.