U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-J&S CORP.

DATE: JULY 11, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a bakery, seeks to permanently employ the beneficiary in the United States as a "Korean Style Head Pastry Chef" under the immigrant classification of skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). The Director, Texas Service Center, initially approved the petition, but subsequent revoked the approval. The matter is now before us on appeal. Upon *de novo* review we will we will remand the matter to the Director for further proceedings.

The Director of the Texas Service Center initially approved the petition. The Director subsequently revoked the approval of the petition on the grounds that the evidence of record did not establish that the Beneficiary possessed the required employment experience, and also did not establish that the Petitioner had the continuing ability to pay the proffered wage of the offered position.

On appeal, the Petitioner claims that it never received the Director's notice of intent to revoke (NOIR) the approval of the petition. The Petitioner also submits additional evidence and asserts that it has the ability to pay the proffered wage and that the Beneficiary possessed the required experience.

Upon *de novo* review, we will remand the decision to the Director for further consideration.

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).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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. Section 212(a)(5)(A)(i)(I)-

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date." A beneficiary must be eligible as of that date, and so in this case the Beneficiary must have had the requisite experience by the date the labor certification was filed.

(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 applies 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.

Under section 203(b)(3)(A)(i) of the Act, immigrant classification may be granted to qualified immigrants who are capable of performing skilled labor, requiring at least two years of training or experience, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Acting Reg'l Comm'r 1977). The petitioner must also establish its continuing ability to pay the proffered wage of the job offered from the priority date up to the present. *See* 8 C.F.R. § 204.5(g)(2). The priority date of the instant petition is September 25, 2009, which is the date the underlying labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

II. ANALYSIS

The petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), which was certified by the DOL. The labor certification requires at least 24 months of experience in the job offered, and asserts that the Beneficiary gained the requisite experience working as head baker for the in South Korea, from January 1999 to July 2005.

The Director approved the petition in 2010. Five years later, the Director issued a NOIR. When the Petitioner did not respond to the NOIR, the Director revoked the approval of the petition on the grounds that the evidence of record did not establish that the Beneficiary had two years of qualifying experience, as required by the labor certification, and also did not establish that the Petitioner had the continuing ability to pay the proffered wage of the job offered from the priority date of the petition (September 25, 2009) onward.[2]

In his decision the Director discussed numerous evidentiary inconsistencies and shortcomings which led to his findings.

With regard to the Beneficiary's work experience, the decision stated the following:

- The Director noted that a nonimmigrant visa petition filed by the Beneficiary's

[2] Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security] may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

previous employer in July 2003 stated that the Beneficiary was employed as a "shop manager" for " which appeared to be a different job than "Head Baker" as asserted on the Beneficiary's "Certificate of Career" signed by Director of Human Resources for the bakery business unit of the which was submitted in this proceeding.

- The Director noted that three different addresses for the Beneficiary's previous employer in South Korea are indicated on the certificate of experience, the labor certification application, and the company's website.
- While the labor certification highlights the supervisory functions of the Petitioner's Head Pastry Chef position, the Petitioner's federal tax return for 2009 recorded just $38,669 in salaries and wages paid that year, of which $33,481.68 went to the Beneficiary, which left only $5,187.32 for other employees and raised the question of whether there were, in fact, any other employees to supervise.

With regard to the Petitioner's ability to pay the proffered wage, the Director noted that there were no federal income tax returns from the Petitioner or W-2 forms and/or payroll records from the Beneficiary for the years 2010-2014. Thus, there was no evidence of the Petitioner's ability to pay subsequent to 2009.

In addition, the decision addressed the following issue of credibility:

- There is evidence in the record that the Beneficiary was enrolled in an English language course at the in California, from April 30, 2007 to October 24, 2008. However, a Form G-325A signed by the Beneficiary on October 3, 2013, indicated that he was living in Georgia, during most of this time period (from August 2007 onward). The Beneficiary did not explain how he could study in California and live in Georgia at the same time.

On appeal, the Petitioner claimed that it never received the Director's NOIR due to an address change and therefore could not submit a response.[3] The appeal also addressed the evidentiary issues discussed in the Director's decision and submitted additional documentation.

One of the documents the Petitioner submitted is a letter dated January 28, 2016, which bears the signature of identified as "Human Resources/Partner" of in and certifies that the Beneficiary was employed as "Head Baker & Shop Manager" from January 7, 1999 to July 25, 2005. According to the letter, the Beneficiary was

[3] Notice must be provided to the Petitioner before a previously approved petition can be revoked. *See* 8 C.F.R. § 205.2. Further, the regulation at 8 C.F.R. § 103.2(b)(l6) requires USCIS to disclose derogatory information of which the petitioner is unaware, to afford the petitioner an opportunity to rebut the information before the decision is rendered. A NOIR is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the Petitioner's failure to meet its burden of proof. *Matter of Arias,* 19 I&N Dec. 568 (BIA 1988); *Matter of Estime,* 19 I&N Dec. 450 (BIA 1987).

working as a "head baker" with responsibility for the preparation of baked goods, and was also responsible for managing other employees. Thus, the Beneficiary's position carried two job titles – "head baker" and "shop manager."

The information provided in the above letter, however, conflicts with information USCIS has obtained through our field office in The USCIS field office contacted by telephone and spoke with in the human resources office. stated that there is no record of the Beneficiary's employment by the and that she does not recall preparing any certificate of experience on behalf of the Beneficiary.

Based on the telephone information from it appears that the employment verification letter of January 28, 2016, may not be authentic. It is incumbent upon an applicant 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).

Given the procedural history of this case, we will remand the matter the Director of the Texas Service Center in order to issue a new NOIR. The NOIR should take into account the evidence and the arguments submitted by the Beneficiary on appeal as well as the new derogatory evidence pertaining to the Beneficiary's claimed employment at The NOIR should also request updated evidence of the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

We will remand the matter to the Director to review the evidence submitted on appeal and the new derogatory information relating to the Beneficiary's employment experience, and issue a new NOIR to the Petitioner at its current address.

ORDER: The matter is remanded to the Director of the Texas Service Center for further proceedings consistent with the foregoing decision and for the entry of a new decision.

Cite as *Matter of W-J&S Corp.*, ID# 07906 (AAO July 11, 2017)