U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 07963809

DATE: JULY 22, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a convenience store with gas station, seeks to employ the Beneficiary as a store manager. It requests classification of the Beneficiary as a skilled worker 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 two grounds: the Director determined that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date onward or that the Beneficiary had two years of qualifying experience by the priority date, as required to meet the minimum requirements of the labor certification. The Petitioner filed an appeal, which we dismissed on the same grounds.

The matter is now before us on a motion to reopen and a motion to reconsider. Upon review, we will withdraw our previous finding that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward, but affirm our finding that the Petitioner has not established that the Beneficiary gained at least two years of qualifying experience by the petition's priority date. Accordingly, we will dismiss the motions.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must demonstrate that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. *See* 8 C.F.R. § 103.5(a)(3).

To qualify for classification as a skilled worker a beneficiary must have at least two years of training or experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B). A beneficiary must also meet the specific educational, training, experience, or other requirements of the labor certification. *Id.* All requirements must be met by the petition's priority date,[1] which in this case is September 6, 2017. *See Matter of*

[1] The priority date of a petition is the date the underlying labor certification is filed with the Department of Labor. *See* 8 C.F.R. § 204.5(d).

Wing's Tea House, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In addition, the petitioner must establish its ability to pay the proffered wage of the job offered from the priority date until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

II. ANALYSIS

A. Motion to Reopen

1. Petitioner's Ability to Pay the Proffered Wage

The Petitioner has supplemented the record with additional documentation on motion. Based on all of the evidence now before us and the totality of the Petitioner's circumstances, as in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967), we determine that the Petitioner has established, by a preponderance of the evidence, its continuing ability to pay the proffered wage from the priority date onward.

2. Beneficiary's Experience

The labor certification that accompanied the Petitioner's Form I-140, Immigrant Petition for Alien Worker, states that the minimum experience required for the job of store manager is 24 months in the job offered or in a related managerial position. According to the claimed experience on the labor certification the Beneficiary met and exceeded this requirement with more than ten years of experience as a manager/owner at [redacted] in [redacted] Pakistan, before the priority date of September 6, 2017.

With its initial evidence the Petitioner submitted a copy of a letter dated July 16, 2018, on the letterhead of [redacted] in [redacted] Pakistan, signed by [redacted] stating that the Beneficiary was "manager/owner" of the business from June 1, 2007 to September 6, 2017. In response to a request for evidence (RFE) the Petitioner augmented the record with an affidavit from [redacted] dated December 28, 2018, stating that he had a business partnership with the Beneficiary in which he owned 40% and the Beneficiary owned 60% of [redacted] that the Beneficiary managed all aspects of the business, and that in the Beneficiary's absence[2] [redacted] was managing the business. The Petitioner also submitted an affidavit from the Beneficiary reiterating the information provided by [redacted] another affidavit from a customer stating that he had known the Beneficiary "since he opened up his [redacted] business," some photos of the store, and copies of tax records from Pakistan's Federal Board of Revenue documenting three years of tax returns filed by [redacted]

The Director found that none of the foregoing documentation established that the Beneficiary was a co-owner, co-manager, or co-partner of [redacted] with [redacted] or that the Beneficiary gained any qualifying experience at that business. The Director concluded that the evidence of record did not establish that the Beneficiary had 24 months of qualifying managerial experience, as required to meet the minimum experience requirement of the labor certification.

[2] The petition indicates that the Beneficiary came to the United States with a B-2 visa in April 2018.

On appeal the Petitioner submitted a copy of a deed of partnership between the Beneficiary and [redacted] in connection with [redacted] dated May 25, 2007, as well as affidavits from five suppliers and three customers of the business attesting to their interaction with the Beneficiary. In our decision dismissing the appeal we discussed certain inconsistencies and evidentiary deficiencies in the Petitioner's claims and supporting documentation with respect to the Beneficiary's alleged role in the business. Most importantly, while the deed of partnership dated in 2007 purportedly granted the Beneficiary a 60% interest in [redacted] there was no official documentation in the record corroborating that the Beneficiary either co-owned or managed the business in succeeding years. We noted that the tax filings with the Pakistani government covering three fiscal years from July 1, 2015, through June 30, 2018, were from [redacted] alone and did not mention the Beneficiary as a co-owner of, or in any other way associated with, [redacted] We also noted that there were no Pakistani tax returns in the record from the Beneficiary showing that he had an ownership interest in (or was employed and paid by) [redacted] We indicated that the affidavits in the record from individuals in Pakistan who claim a connection to the business as customers or suppliers would have more credence if supplemented by business records confirming the Beneficiary's role in the business. We concluded that the record contained no independent objective evidence that the Beneficiary gained any qualifying experience as a store manager with [redacted]

In support of the motion to reopen the Petitioner submits an affidavit from a Pakistani citizen, [redacted] who states that he started [redacted] in 1998[3] and when he retired in 2007 he gave the business to [redacted] his longtime employee, and the Beneficiary, his nephew. The Petitioner claims that the Beneficiary was an employee of [redacted] during the years 2002-2007, when it was wholly owned by his uncle, [redacted], and submits a copy of a notice which appears to have been issued in October 2002 by a Pakistani health officer to the Beneficiary at [redacted] advising the business to obtain the license to operate as required by law within seven days. The Petitioner also submits a copy of a document entitled "Display Agreement (For Snacks)" purportedly signed by the Beneficiary on behalf of [redacted] and a representative of a Pakistani company in [redacted] on August 1, 2016. According to the Petitioner, these materials confirm the Beneficiary's long-time association with [redacted] as an owner and manager.

With regard to the notice from the Pakistani health official in 2002, the Petitioner asserts that the Beneficiary was managing the store at the time the health inspectors arrived because his employment at [redacted] actually began in 2002, not in 2007 as indicated in the labor certification. According to the labor certification the Beneficiary worked at [redacted] as manager/ owner from June 1, 2007, to September 6, 2017 (the priority date of the petition). The Petitioner contends that the labor certification only required that jobs in the last three years be listed in the work experience section for the Beneficiary, and that experience before 2007 was therefore not required to be listed. However, the instructions at section K (Alien Work Experience) state that in addition to all jobs in the last three years "any other experience that qualifies the [Beneficiary] for the job opportunity" should also be listed. Thus, any managerial experience the Beneficiary had with [redacted] from 2002 to 2007 should also have been listed in the labor certification. The failure

[3] The previously submitted tax filings from [redacted] also state that the business started in 1998.

to list work experience in a labor certification lessens the credibility of the claimed experience and supporting evidence. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). Moreover, as no experience was listed for the years 2002-2007, we may assume that any employment the Beneficiary may have had with [redacted] if any, in those years was non-managerial in nature, and therefore non-qualifying for the job opportunity in the labor certification.

As for the "Display Agreement (for Snacks)" between the [redacted] and another Pakistani company, dated August 1, 2016, it contains two longhand iterations of what the Petitioner contends is the Beneficiary's signature, neither of which appears to match any of the three signatures previously submitted by the Beneficiary – on the labor certification, on the deed of partnership, and on the affidavit submitted in response to the RFE. Therefore, the evidentiary weight of the "Display Agreement (for Snacks)" is questionable. Furthermore, even if there is an authentic signature of the Beneficiary on the document, there is no indication as to the Beneficiary's job title or specific role with the [redacted] in 2016.

In its motion brief the Petitioner states that the Beneficiary had requested copies of his tax returns from the Pakistani government, and that they would be submitted as soon as the tax returns arrived. No such documentation has been received by us, however, nor any further communication from the Petitioner on that matter. The Petitioner requests that we review the Beneficiary's Form DS-160 which he completed to obtain his B-2 visitor's visa in 2016 and thereby confirm that the employment experience claimed in that application is the same as that claimed in the instant petition. The information provided in a Form DS-160, however, cannot substitute for primary evidence of the Beneficiary's work experience that his Pakistani tax returns would furnish, if the Beneficiary did indeed work for and receive compensation from [redacted] The Petitioner has provided no explanation for the continued omission of the Beneficiary's Pakistani tax returns from the record.[4]

In visa petition proceedings it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act. 8 U.S.C. § 1361. In connection with this burden it is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence.[5] 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.*

In view of the ongoing evidentiary deficiencies discussed above, we conclude that the Petitioner has not established on motion that the Beneficiary gained at least two years of qualifying experience with [redacted] by the priority date of September 6, 2017, as required to meet the terms of the

[4] The regulation at 8 C.F.R. § 103.2(b)(14) provides that the failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request.

[5] One specific inconsistency which we noted in our previous decision involved the photos of the business that had been submitted in response to the RFE. Four of the photos show the business name above the shop entrance as [redacted], while a fifth photo of the business name (not located above the store entrance) identifies the business as [redacted] (emphases added). No explanation has been provided by the Petitioner for this inconsistency.

labor certification and to be eligible for classification as a skilled worker. Therefore, we will dismiss the motion to reopen on this issue.

2. Motion to Reconsider

The Petitioner does not assert that that our previous decision with regard to the Beneficiary's experience was based on an incorrect application of law or policy, as required for a motion to reconsider under 8 C.F.R. § 103.5(a)(3). Therefore, we will dismiss the motion to reconsider on this issue.

III. CONCLUSION

The Petitioner has established its continuing ability to pay the proffered wage from the priority date onward. Accordingly, we will withdraw the Director's finding to the contrary. However, the Petitioner has still not established that the Beneficiary gained at least two years of qualifying managerial experience by the priority date of September 6, 2017. Therefore, the petition cannot be approved.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.