U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31572117

Date: JULY 22, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as a chef specializing in Japanese cuisine. 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 U.S. permanent residence in this category to work in jobs requiring at least two years of training or experience. *Id.*

After first granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. On appeal, we withdrew the Director's finding that the Beneficiary willfully misrepresented his claimed qualifying experience on the accompanying certification from the U.S. Department of Labor (DOL). *See In Re: 01651704* (AAO July 8, 2022). But we remanded the matter for consideration of additional derogatory evidence regarding the Beneficiary's claimed qualifying experience. *Id.*

On remand, after issuing a new notice of intent to revoke (NOIR) and considering the Petitioner's response, the Director again revoked the petition's approval, finding insufficient evidence of the Beneficiary's claimed qualifying experience. On a second appeal, the Petitioner submits additional evidence and asserts that the Director improperly weighed the company's proof.[1]

In these revocation proceedings, the Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Love Korean Church v. Chertoff*, 549 F.3d 749, 754 (9th Cir. 2008); *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that regulations and case law bar our consideration of the company's appellate evidence and that the record supported the Director's most recent revocation. We will therefore dismiss the appeal.

[1] On remand, the Director also found the Beneficiary eligible to participate in these revocation proceedings because he qualifies to "port" to a new job under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly requested to do so. *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). The Beneficiary, however, did not respond to the Director's second NOIR or appeal the second revocation decision. Also, the Beneficiary's eligibility to port does not bar U.S. Citizenship and Immigration Services' (USCIS') from revoking this petition's approval. *See Herrera v. USCIS*, 571 F.3d 881, 889 (9th Cir. 2009).

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain DOL certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and a noncitizen's permanent employment in the job would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to USCIS. Section 204(a)(1)(F) of the Act. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D), (4).

Finally, if USCIS approves a petition, a beneficiary may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245(a) of the Act, 8 U.S.C. § 1255(a).

"[A]t any time" before a beneficiary obtains permanent residence, however, USCIS may revoke a petition's approval "for good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a NOIR if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the petition's denial. *Herrera*, 571 F.3d at 886; *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner does not timely respond to a NOIR or the response does not overcome the listed revocation grounds, USCIS may revoke a petition's approval. *Matter of Estime*, 19 I&N Dec. at 452.

II. ANALYSIS

A. The Required Experience

A petitioner for a skilled worker must demonstrate that a beneficiary met all DOL-certified requirements of an offered job by a petition's priority date. 8 C.F.R. § 204.5(l)(3)(ii)(B); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is August 12, 2014, the date DOL accepted the Petitioner's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

When assessing a beneficiary's qualifications for a job opportunity, USCIS must examine the job-offer portion of an accompanying labor certification to determine the job's minimum requirements. USCIS may neither ignore certification terms nor impose unstated requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The Petitioner's labor certification states the minimum requirements of the offered job of specialty chef as two years' experience "in the job offered." For labor certification purposes, the phrase "in the job offered" means "experience performing the key duties of the job opportunity, specifically those

listed [on the labor certification]." *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *3 (BALCA Oct. 24, 2011) (citations omitted). The company indicated that it would not accept experience in an alternate occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than three years of full-time experience in the job offered. He stated that, from March 2003 to May 2006, a restaurant in South Korea employed him as a chef specializing in Japanese cuisine.

To demonstrate claimed qualifying experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must include the employer's name, title, and address, and a description of the beneficiary's experience. *Id.* "If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered." 8 C.F.R. § 204.5(g)(1).

The Petitioner initially submitted a 2015 letter from the owner of the restaurant that purportedly employed the Beneficiary from March 2003 to May 2006. The Director's most recent NOIR, however, noted discrepancies in the Beneficiary's claimed qualifying experience. On an application for a U.S. visitor's visa in November 2006, the Beneficiary attested that he then worked as an assistant manager at a construction company in South Korea. Asked on the application's supplement to list his prior two employers, he indicated: "None." The Beneficiary's indication in November 2006 that he had no prior employers before the construction company casts doubt on his claimed qualifying full-time experience from March 2003 to May 2006. *See Love Korean Church*, 549 F.3d at 754 (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies); *Matter of Ho*, 19 I&N Dec. at 592 (same).

The Beneficiary had submitted statements from four of his purported former co-workers at the restaurant. But the NOIR noted the statements' unreliability. They were not on the restaurant's stationery, and the record otherwise lacked supporting evidence of the restaurant's employment of the individuals during the Beneficiary's purported tenure there.

Further, the NOIR noted that a copy of the restaurant's December 2004 business registration certificate states its "[r]eason for issuance" as a "change in business type." The certificate appears to indicate that, in December 2004, the restaurant began operating a different type of business. Thus, the certificate casts additional doubt on the Beneficiary's claim that he obtained at least two years of qualifying experience at the restaurant from March 2003 to May 2006. *See Love Korean Church*, 549 F.3d at 754; *Matter of Ho*, 19 I&N Dec. at 591.

Unexplained and unrebutted, the NOIR's allegations would have warranted the petition's denial for insufficient evidence of the Beneficiary's claimed qualifying experience. The Director therefore properly issued the NOIR. *See Herrera*, 571 F.3d at 886; *Matter of Estime*, 19 I&N Dec. at 451.

In response, counsel contended that, when the Beneficiary applied for a U.S. visitor's visa in 2006 at the U.S. consulate in South Korea, the consulate only had visa application forms in the English language. Because the Beneficiary did not then know English, counsel stated that he paid a business to complete the application form for him and that he did not know its English contents.

As the Director noted, however, the Beneficiary's signature on the visa application established a "strong presumption" that he knew the application's contents and consented to them. *See Matter of Valdez*, 27 I&N Dec. 496, 499 (BIA 2018). "Given the nature and significance of immigration documents . . ., it is reasonable to expect that [noncitizen]s will take steps to ascertain the accuracy of documents they sign and obtain a translation, if necessary." *Id.* at 500. Thus, the Beneficiary's claimed unawareness of the document's falsities does not rebut the strong presumption that he knew the application's contents. Also, counsel's statements do not constitute evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984) ("Counsel's unsupported assertions" do not constitute evidence); *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 argued that it is "unreasonable to ask the beneficiary to find witnesses who continue to be employed at the same restaurant since 2003 when he began working there." But the Director's NOIR did not ask the company to submit evidence from witnesses who have worked at the restaurant since 2003. Rather, the Director asked for corroborating evidence that the purported former co-workers, whose statements the Petitioner submitted, worked at the restaurant when the Beneficiary did.

On appeal, the Petitioner further contends that USCIS erred in rejecting the statements of the Beneficiary's four purported former co-workers. The company states that USCIS unreasonably required the statements' printing on the restaurant's letterhead. The company argues that the Agency improperly rejected the company's explanation that small businesses' in South Korea often lack letterhead and instead stamp company seals on their correspondence.

Contrary to the Petitioner's contention, however, USCIS did not require the purported co-workers' statements on the restaurant's letterhead. In the NOIR and decision, the Director noted that "[t]he record lacks independent, corroborating evidence that they worked at the restaurant during the beneficiary's tenure there." Thus, besides statements on the restaurant's letterhead, USCIS would have accepted other independent, corroborating evidence - such as tax or contemporaneous business records - of the business's employment of them during the relevant period.

The Petitioner also contends that other evidence outweighed USCIS' doubts about the restaurant's 2004 registration certificate's "change in business type." Counsel asserts that the certificate refers to a change in the restaurant owner's taxpayer classification, not the business's classification. Counsel also argues that the restaurant's letters post-dated 2004, indicating that the business continued to operate as a restaurant after 2004.

The record, however, lacks sufficient evidence that the "change in business type" on the 2004 registration certificate refers to the restaurant owner's taxpayer classification. *See Phinpathya*, 464 U.S. at 188-89 n.6; *Matter of S-M-*, 22 I&N Dec. at 51 (holding that a counsel's statements do not constitute evidence). Also, the letters' indication that the business continued post-2004 operations as a restaurant does not outweigh other doubts about the Beneficiary's claimed qualifying experience, including: his discrepant employment history on the 2006 U.S. visa application; the "change in business type" on the 2004 registration certificate; and the lack of independent corroborating evidence that his purported co-workers worked at the restaurant when he did.

The Petitioner has not demonstrated the Beneficiary's qualifying experience for the offered job. We will therefore affirm the petition's revocation.

B. The Appellate Evidence

On appeal, the Petitioner submits additional evidence of the Beneficiary's claimed qualifying experience. But we do not consider evidence on appeal if a petitioner received prior notice and a reasonable opportunity to submit such materials. 8 C.F.R. § 205.2(b); *see also Suazo-Caldamas v. INS*, 992 F.2d 1220, 1220 (9th Cir. 1993); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Our first appellate decision in July 2022 notified the Petitioner of the need for additional evidence of the Beneficiary's claimed qualifying experience. The Director's second NOIR in June 2023 provided the company with additional notice and opportunity to submit such evidence. We therefore decline to consider the Petitioner's evidence on appeal.

III. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's qualifying experience for the offered job. We will therefore affirm the revocation of the petition's approval.

ORDER: The appeal is dismissed.