U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17323194

Date: JUN. 16, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a maker and seller of soap and other skincare products, seeks to employ the Beneficiary as a purchasing and logistics manager. The company requests her classification under the third-preference, immigrant category for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

After first approving the petition, the Director of the Nebraska Service Center revoked its approval, concluding that the Petitioner willfully misrepresented the location of the intended worksite on the accompanying labor certification.

In revocation proceedings, the Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position will not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a designated noncitizen 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. THE NOTICES OF INTENT TO REVOKE

"[A]t any time" before a beneficiary obtains lawful permanent residence, USCIS may revoke the approval of an immigrant visa petition for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. Unless a filing warrants "automatic revocation" under 8 C.F.R. § 205.1, USCIS may revoke a petition's approval only after sending a petitioner a notice of intent to revoke (NOIR). 8 C.F.R. § 205.2(a), (b). A NOIR allows a petitioner an opportunity to submit evidence in support of a petition and in opposition to alleged revocation grounds. 8 C.F.R. § 205.2(b).

A NOIR must include a specific statement of both the facts and the supporting evidence underlying a proposed revocation. *Matter of Estime*, 19 I&N Dec. 450, 451-52 (BIA 1987). USCIS may issue a NOIR if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the filing's denial. *Id.* at 451.

In a letter, the Petitioner's owner/president stated the company's employment of the Beneficiary in the offered position of purchasing and logistics manager since November 2015. The Petitioner filed the petition in August 2017, attesting to the company's intention to employ the Beneficiary in the position on a full-time, permanent basis. About two months after the filing, USCIS approved the petition.

In June 2019, the Director issued a NOIR. The NOIR notes that the accompanying labor certification lists the proposed worksite of the offered position as Suite 200 at an address in [redacted] Arizona. Other evidence of record, however, indicated the Petitioner's business activities at the same address in Suite 400. In response to the Director's prior request for additional evidence (RFE), counsel stated that Suite 200 housed the Petitioner's manufacturing facility, while the company maintained its corporate business offices in Suite 400. The NOIR further notes that, in March 2019, USCIS officers visited the [redacted] address and found both suites locked and largely empty. In addition, Suite 400 bore the name of another business.

Based on these facts, the NOIR alleges the Petitioner's willful misrepresentation of the location of the proposed worksite on the labor certification application. The notice notes that USCIS may invalidate a labor certification based on a finding of fraud or willful misrepresentation of a material fact involving the certification application. *See* 20 C.F.R. § 656.30(d). Because the petition requires a valid labor certification, *see* 8 C.F.R. § 204.5(l)(3)(i), the NOIR indicates that the certification's invalidity would have warranted the petition's denial.

In its NOIR response, the Petitioner submitted evidence that, in January 2018, it closed its corporate business offices and manufacturing facility in the [redacted] suites. The Petitioner stated that it "built out" a retail site in [redacted] Arizona to house those operations.[1] The company admitted that it neglected to notify USCIS of the address change. The Beneficiary attested that the USCIS officer who interviewed her in October 2018 regarding her application for adjustment of status did not ask her about the company's address.

[1] The Petitioner's new proposed worksite in [redacted] lies within the same metropolitan statistical area (MSA) as the [redacted] worksite. *See* 20 C.F.R. § 656.3 (defining the term "area of intended employment" to include any place within the MSA of a proposed worksite). The change in worksite location therefore does not invalidate the labor certification. *See* 20 C.F.R. § 656.30(c)(2) (limiting a labor certification's validity to the particular job opportunity, noncitizen, and area of intended employment stated on the certification).

In December 2019, the Director issued a second NOIR. The NOIR notes that, contrary to counsel's RFE response, a letter from the owner of the [redacted] property states that Suite 200 housed the Petitioner's corporate business offices, while the company manufactured products in Suite 400. Also, although indicating the Petitioner's relocation of its corporate business offices to Suite 200 in March 2016, the letter states that Suite 400 did not house the company's manufacturing facility until August 2016, about a month after the filing of the labor certification application. The NOIR therefore alleges that, at the time of its filing, the application misrepresented the location of the Petitioner's manufacturing facility where the Beneficiary would purportedly work.

The only indication, however, that the Beneficiary would work at the Petitioner's manufacturing facility was counsel's RFE response. Counsel's statement does not constitute evidence of record. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Neither the labor certification nor other evidence indicates that the proposed worksite at Suite 200 housed (or would house) the company's manufacturing facility. Rather, the letter from the owner of the [redacted] property identifies Suite 200 as the site of the Petitioner's corporate business offices and states the company's use of them before the filing of the labor application. Thus, the record does not support the Petitioner's alleged misrepresentation of the proposed worksite on the labor certification application.

The allegations in the NOIRs would not have warranted the petition's denial. *See Matter of Estime*, 19 I&N Dec. at 451. We will therefore withdraw the revocation decision.[2]

III. INTENT TO EMPLOY THE BENEFICIARY IN THE OFFERED POSITION

Although unaddressed by the Director, the Petitioner did not demonstrate its ability or intent to employ the Beneficiary in the position described on the labor certification.

A business may file an immigrant visa petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a noncitizen beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis).

The labor certification states the job duties of the offered position of purchasing and logistics manager as planning, directing, and coordinating "purchasing, forecasting, warehousing and distribution of company soaps and skincare products." The position's job duties also include overseeing customer service, managing logistics personnel and systems, and directing the company's daily operations. At the time of the petition's filing in August 2017, the Petitioner's owner/president stated the company's operation of four retail stores and "a full-scale manufacturing facility."

Inconsistencies of record cast doubt on the Petitioner's claimed intent to employ the Beneficiary in the described position. The position, in part, involves "[p]lan[ning], direct[ing] and coordinat[ing] . . . warehousing." The Petitioner submitted copies of numerous leases and photographs regarding its

[2] The Director's decision revoking the petition's approval did not invalidate the accompanying labor certification.

operations. But none of the materials indicate the company's use of a warehouse. Thus, contrary to the job duties of the offered position, the record does not indicate that the Beneficiary would plan, direct, and coordinate "warehousing."

Also, although the Petitioner attested to employing the Beneficiary in the offered position since November 2015, the record shows that she signed a lease for the Petitioner in September 2016 identifying her as the company's "VP [Vice President of] Operations." In addition, while the duties of the offered position include "direct[ing] daily operations of [the] skincare company," the Petitioner's owner/president attested in a June 2019 affidavit that "[w]ithin [the company], the CEO is responsible for overseeing and directing all the day-to-day business and financial operations." These discrepancies cast doubt on whether the Beneficiary would perform the DOL-certified, job duties of the offered position. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

Additional inconsistencies undermine the Petitioner's claimed continuous maintenance of a "manufacturing facility." The Petitioner's owner/president attested that, after bringing manufacturing operations "in-house" in 2015, the company maintained its corporate offices and a production facility at a mall in [redacted] where the Petitioner also operated a retail store. The company submitted a copy of a lease to the [redacted] site. But the document does not appear to allow manufacturing there. The lease limits the Petitioner's use of the premises "for the sole purpose of displaying and selling (subject to the approval of the Landlord) to the public at retail (Novelty) hand made soaps and beauty products filled with locally sourced natural herbs and oils; and for no other use or purpose."[3]

The Petitioner submitted evidence that, from 2016 to January 2018, the company operated its corporate offices and a manufacturing facility from the suites in [redacted] A July 2019 letter from a business analyst states that the company then moved those operations to a mall in [redacted] where it also operated a retail store. But a copy of the Petitioner's lease to the [redacted] property is dated April 15, 2019. The record does not explain where the Petitioner purportedly operated its manufacturing facility from January 2018 to April 2019. Also, part VII.A. of the [redacted] lease limits the Petitioner's use of the property "solely for the purpose of conducting therein the business of the retail sale of homemade soaps and skin care products." In addition, item 10 of a list of "Rules and Regulations" accompanying the lease specifically bars the Petitioner's use of the premises "for any . . . manufacturing."

The limitations on the Petitioner's use of the [redacted] and [redacted] properties, and the gap of more than a year between the company's departure from the [redacted] suites and its signing of the [redacted] lease, cast doubts on the Petitioner's claimed continuous manufacturing operations. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). The offered position involves performing duties in manufacturing-related fields such as: purchasing; warehousing; distribution; and logistics. Thus, if the Petitioner does not continuously manufacture products, the record does not demonstrate the company's intent to permanently employ the Beneficiary in the full-time, offered position.

[3] The lease, which runs from November 2018 through December 2019, does not cover the 2015-16 period during which the Petitioner claims the property housed its manufacturing facility. We infer that, during the applicable period, the property's owner likely limited the Petitioner's use of the premises in a similar manner.

The Director did not inform the Petitioner of this potential, revocation ground. We will therefore remand the matter. On remand, the Director should issue the Petitioner a new NOIR detailing the evidentiary deficiencies regarding the company's claimed intent to employ the Beneficiary in the described position.

IV. THE REQUIRED EXPERIENCE

Also unaddressed by the Director, the evidence of record does not establish the Beneficiary's possession of the experience required for the offered position.

A petitioner must demonstrate that a beneficiary met all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is July 8, 2016, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. USCIS may neither ignore a certification term nor impose additional 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 accompanying labor certification states the minimum requirements of the offered position of purchasing and logistics manager as a U.S. high school diploma, or an equivalent foreign credential, plus 10 years of experience in the job offered or in "purchasing, logistics or Supply Chain Management." Also, part H.14 of the labor certification, "Specific skills or other requirements," states that five of the 10 years of qualifying experience must be "in cosmetics or [a] related industry."

On the labor certification, the Beneficiary attested that, by both the petition's priority date and her start date of employment with the Petitioner,[4] she gained more than 16 years of full-time, qualifying experience. She stated the following prior employment:

- About four years, eight months as a purchasing and logistics manager for a skincare manufacturer and distributor in Canada, from December 2009 through July 2014;
- About four years, 10 months as a purchasing and logistics manager for a skincare manufacturer and distributor in Israel, from December 2004 through October 2009; and
- About six years, nine months as a purchasing manager for a medical device company in Israel, from March 1998 through November 2004.

To support claimed qualifying experience, a petitioner must provide letters from a beneficiary's former employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must contain the employers' names, titles, and addresses, and descriptions of the beneficiary's experience. *Id.*

[4] A labor certification employer cannot rely on experience that a sponsored noncitizen gained with the business, unless the beneficiary gained the experience in a position substantially different than the offered one; or the employer can demonstrate the impracticality of training a U.S. worker for the position. 20 C.F.R. § 656.17(i)(3). The Petitioner has not asserted that the Beneficiary gained qualifying experience with it.

The Petitioner provided letters from all three of the Beneficiary's purported former employers. Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), however, the letter from the Canadian skincare company neither contains the author's title nor describes the Beneficiary's experience. Also, the letter from the Israeli skincare company is not signed, and therefore merits little evidentiary weight. This letter also is on U.S. stationery, and the record does not explain how the author gained knowledge of the Beneficiary's claimed experience in Israel. Thus, these two letters do not establish the Beneficiary's possession of qualifying experience.

The third letter, from the Israeli medical device company, meets regulatory requirements. But the letter documents the Beneficiary's possession of less than the requisite 10 years of qualifying experience. Also, contrary to the additional requirements on the labor certification, the letter does not demonstrate the Beneficiary's possession of experience in cosmetics or a related industry.

In response to the Director's RFE, the Petitioner submitted a letter from a purported former vice president of the Canadian skincare company. The letter, however, is on the signatory's personal stationery. The record lacks evidence corroborating his claimed tenure with the Canadian company during the relevant period. The letter therefore does not reliably establish the Beneficiary's claimed, qualifying experience in Canada. Also, the letter, if sufficiently corroborated, would document less than the requisite five years of experience in the cosmetics industry.

The new NOIR should notify the Petitioner of these evidentiary deficiencies. If supported by the record, the new notice may include additional potential grounds of revocation.

The Director must afford the Petitioner a reasonable opportunity to resolve all issues on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

V. CONCLUSION

The Director's NOIRs allege insufficient grounds to revoke the petition's approval. Evidence of record, however, does not demonstrate the Petitioner's intent to employ the Beneficiary in the offered position or her possession of the minimum experience needed for the job.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.