U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K- CORP.

DATE: JUNE 19, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a retail restaurant, seeks to employ the Beneficiary as a restaurant 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 positon that requires at least two years of training or experience.

The petition was initially approved. The Director of the Texas Service Center subsequently revoked the approval, finding that the Petitioner had not adequately explained evidentiary inconsistencies concerning the Beneficiary's employment history and had not established that the Beneficiary met the minimum experience requirement of the labor certification.

On appeal, the Petitioner asserts that the documentation it previously submitted establishes by a preponderance of the evidence that the Beneficiary met the two-year experience requirement of the labor certification.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089, Application for Permanent Employment Certification) from the U.S. Department of Labor (DOL). *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 U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(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 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.

Section 205 of the Act 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c).

II. ANALYSIS

A. Minimum Requirements of the Labor Certification

The petition was accompanied by a labor certification that required two years of experience in the job offered to qualify for the proffered position of restaurant manager. A beneficiary must meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date.[1] *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The labor certification listed one prior job for the Beneficiary, stating that she was employed as a restaurant manager by [redacted] in [redacted] South Korea, from January 2, 2000, until January 15, 2002. A letter from the restaurant's president, certifying that the Beneficiary was employed as claimed on the labor certification, was submitted with the petition.

The petition was initially approved in March 2011, but the Director issued a notice of intent to revoke (NOIR) in December 2016, citing a nonimmigrant visa application signed by the Beneficiary in April 2003 which stated that she worked as a clerk for [redacted] in [redacted] and did not list any other prior employment. The Director noted that this contradicted the employment claimed on the labor certification. After receiving the Petitioner's response to the NOIR, the Director issued a decision revoking the approval of the petition. In his decision the Director discussed three pieces of evidence submitted in response to the NOIR – including a statement from the Beneficiary describing her alleged work at [redacted] restaurant and the circumstances of her immigrant visa petition, as well as statements from a family friend in [redacted] Korea and the owner of [redacted] – attesting that the Beneficiary worked at the restaurant. However, the Director found that these statements were not consistent with the information provided in the Beneficiary's nonimmigrant visa petition, and were not supported by objective evidence like tax or payroll records. The Director concluded that the Petitioner did not establish that the Beneficiary had two years of qualifying employment as a restaurant manager, as required by the labor certification.

On appeal the Petitioner asserts that the Director did not properly consider the evidence of record, and that the initial employment verification letter from [redacted] in conjunction with the three

[1] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The priority date in this case is February 18, 2009.

statements submitted in response to the NOIR establishes that the Beneficiary met the two-year experience requirement of the labor certification. We do not agree.

As previously discussed, the initial letter from president, submitted with the petition, states that the Beneficiary was employed as the restaurant's manager from January 2000 to January 2002. In response to the NOIR the Petitioner submitted another letter from president stating that the Beneficiary's employment actually began in the spring of 1999 as counter staff and that she was promoted to restaurant manager in January 2000, as well as a letter from a family friend who likewise states that the Beneficiary was employed during this time frame by The letter from president states that the Beneficiary asked for "permission to work for another job during daytime because of her financial problems" and the letter from the family friend states that the Beneficiary "also worked part-time whenever she can even while doing her job at the restaurant." Neither letter, however, identified any other employer of the Beneficiary. In her own statement responding to the NOIR the Beneficiary asserted that she worked evenings and weekends for the restaurant, which freed up weekdays for other jobs like the clerk position she took at [2] The Beneficiary's explanation for the failure to list employment with on her nonimmigrant visa application in April 2003 was that the form was prepared by a visa application service provider who did not include a complete employment history for the Beneficiary. As noted by the Director in the NOIR, however, the Beneficiary's signature does appear on the nonimmigrant visa application submitted to the Department of State, and that application did not list any employment with despite a question specifically requesting the names of the Beneficiary's last two employers. Further, the Beneficiary answered "No" to the question on the nonimmigrant visa application asking: "Was this application prepared by another person on your behalf?" As such, the nonimmigrant visa application contradicts the Beneficiary's statement.

Moreover, as the Director pointed out in the revocation decision, the Petitioner submitted no documentary evidence in its response to the NOIR to corroborate the Beneficiary's alleged employment by such as tax records, payroll records, or other employment-related materials. That evidentiary deficiency has not been remedied on appeal. Nor has the Petitioner submitted any certificates of income for the years 2000, 2001, or 2002 from the National Tax Service of Korea (NTSK), the government agency to which all employment in South Korea is required to be reported, or statements of national pension coverage from the National Pension Service (NPS). Thus, the Petitioner has not submitted any objective, independent evidence of the Beneficiary's claimed employment by as required to resolve evidentiary inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).[3] Accordingly, the Petitioner has not overcome the Director's ground of revocation.

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[2] The Beneficiary does not state when she started working for how many hours a week she worked there, or when her employment ended. The record indicates that the Beneficiary came to the United States on an F-1 student visa in February 2005.

[3] *Matter of Ho* provides that it is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence, that attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies, and that doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.*

B. Eligibility for Classification as a Skilled Worker

A petition requesting skilled worker classification "must be accompanied by evidence that the [beneficiary] meets the educational, training or experience, and any other requirements of the individual labor certification. . . . . The minimum requirements for this classification are at least two years of training or experience." 8 C.F.R. § 204.5(l)(3)(ii)(B). As discussed in this decision, the evidence of record does not establish that the Beneficiary has at least two years of experience as a restaurant manager. Therefore, she does not qualify for classification as a skilled worker. For this reason as well the petition cannot be approved.

III. CONCLUSION

The Petitioner has not established that the Beneficiary had at least two years of qualifying employment, as required to meet the experience requirement of the labor certification and to qualify for classification as a skilled worker.

ORDER: The appeal is dismissed.

Cite as *Matter of K-Corp.*, ID# 1549485 (AAO June 19, 2018)