U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-Y-M-, INC.

DATE: MAR. 8, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a meat distributor, seeks to employ the Beneficiary as a procurement specialist. It requests his classification 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" category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

After the initially approving the petition, the Acting Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that, as of approval, the Petitioner did not establish the Beneficiary's possession of the minimum experience required for the offered position or the requested classification.

On appeal, the Petitioner asserts that the record demonstrates that the Beneficiary has the requisite experience.

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

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer seeking to permanently employ a foreign national in the United States must obtain U.S. Department of Labor (DOL) certification of the job opportunity. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL considers whether the country has able, willing, qualified, and available workers for an offered position, and whether employment of a foreign national would hurt the wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL certifies a position, an employer must next submit the 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. If USCIS approves a petition, a foreign national may finally 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.

At any time before a foreign national obtains lawful 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, the erroneous approval of a petition may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). USCIS properly issues a notice of intent to revoke where the record as of the notice's issuance - if unexplained or unrebutted - would have warranted the petition's denial. *See Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation lies if the record - including any explanation or rebuttal evidence - would have warranted the filing's denial. *Id.* at 451-52.

II. THE REQUIRED EXPERIENCE

As previously indicated, to qualify as a skilled worker, a foreign national must have at least two years of training or experience. Section 203(b)(3)(A)(1) of the Act. A petitioner must also establish a beneficiary's possession, by a petition's priority date,[1] of all job requirements of a DOL-certified position. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the accompanying labor certification states the minimum requirements of the offered position of procurement specialist as two years of experience in the job offered. On the labor certification, the Beneficiary attested that he gained the requisite experience as a full-time procurement specialist for a furniture manufacturer in South Korea from August 1, 2003, to July 31, 2005. To support the claimed experience, the Petitioner submitted a "certificate" from a chief executive officer (CEO) on the stationery of the furniture manufacturer. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring a petitioner to support a beneficiary's claimed experience with a letter from a former employer). Consistent with the information on the labor certification, the certificate stated that, during the relevant period, the company employed the Beneficiary full-time as a procurement specialist.

In the notice of intent to revoke (NOIR), however, the Director noted that, a few years after the Beneficiary's claimed experience ended, he filed an application for a nonimmigrant U.S. visa that omitted the employment. On the nonimmigrant visa application, the Beneficiary stated his "present occupation" as "evangelist." Asked to identify his prior two employers, he stated: "None." The Beneficiary's omission of the furniture manufacturer as a prior employer on his earlier nonimmigrant visa application cast significant doubt on his claimed, qualifying experience for the offered position and the requested classification. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). Thus, unexplained and unrebutted, the record as of the NOIR's issuance would have warranted the petition's denial.

In response to the NOIR, the Beneficiary stated in an affidavit that he misunderstood the visa application, assuming that it sought information only about post-college work. Because he was on leave from studies while working for the furniture manufacturer, he asserted that he omitted that

[1] This petition's priority date is February 23, 2015, the date the DOL accepted the certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

employment from the application. The NOIR also requested copies of South Korean tax records to confirm the Beneficiary's claimed experience. In an affidavit, however, the CEO of the furniture manufacturer stated that tax records of the Beneficiary's employment do not exist because the company paid him in cash and did not withhold any taxes from his pay. The Beneficiary also asserted that he was not required to pay income taxes because he did not earn enough money.

Despite the proffered explanations, the record lacks sufficient, independent, objective evidence to establish the Beneficiary's claimed experience. The Petitioner asserts that the Director erred in discounting evidence of the Beneficiary's employment, but many of the submitted materials are unreliable. For example, the Petitioner submits copies of an "employee record" and "wage confirmation sheets" from the furniture manufacturer. But these undated documents do not establish their preparations during the Beneficiary's employment. The documents therefore are not reliable evidence of the Beneficiary's experience. The record lacks contemporaneous evidence of the Beneficiary's claimed employment, such as copies of his bank account statements showing deposits during his purported tenure as a procurement specialist. Also, the CEO's affidavit states that the company paid the Beneficiary 2.1 million won a month. But the wage confirmation sheets indicate that it took about a year for the Beneficiary to earn that much. The CEO's affidavit also states a different company address than listed in his prior certificate and on the labor certification. A copy of a business license states a third company address, and the employee record and wage confirmation sheets yet another. The record does not explain the inconsistent company addresses. These unresolved inconsistencies further undermine the reliability of the Petitioner's evidence. *See Matter of Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of its remaining evidence).

In addition, the record does not establish the qualifying nature of the Beneficiary's claimed experience. The labor certification states that the offered position requires experience "in the job offered." Experience in the job offered means experience performing the job duties of the offered position. *See, e.g., Matter of Sumeru Inc.*, 2013-PER-01241 (BALCA Apr. 24, 2017) (citation omitted). Here, the job duties of the offered position include "determin[ing] inventory need and purchas[ing] meat products accordingly for wholesale." On the certification, the Petitioner specified that it would not accept experience in an alternate occupation. The CEO's certificate and affidavit do not establish the Beneficiary's experience with purchasing meat. Rather, the documents indicate that the Beneficiary bought materials for manufacturing furniture. The record therefore does not establish the Beneficiary's experience in the job offered.

For the foregoing reasons, as of the petition's approval, the record did not establish the Beneficiary's possession of the minimum experience required for the offered position or the requested classification.

III. THE ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the Petitioner also did not demonstrate its ability to pay the proffered wage. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a

petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.* Here, the labor certification states the proffered wage of the offered position of procurement specialist as $45,968 a year. As previously noted, the petition's priority date is February 23, 2015.

The Petitioner submitted a copy of its federal income tax returns for fiscal year 2014-15, which ran from May 1, 2014, to April 30, 2015. The tax returns indicate sufficient net current assets to pay the proffered wage. However, the record does not contain evidence of the Petitioner's continuing ability to pay the proffered wage from May 1, 2015, onward. Thus, in any future filing in this matter, the Petitioner must submit updated annual reports, federal tax returns, or audited financial statements to support its ability to pay the proffered wages during its 2015-16 fiscal year.

Also, USCIS records indicate the Petitioner's filing of a petition for another beneficiary that remained approved after this petition's priority date.[2] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Therefore, the Petitioner here had to demonstrate its ability to pay the combined proffered wages of both petitions, unless the Petitioner documents the denial, withdrawal, or revocation of its other petition. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay combined proffered wages of multiple petitions).

In any future filing in this matter, the Petitioner must provide the proffered wage and priority date of the other petition. It may also submit evidence of any wages it paid the other beneficiary during the relevant period and in support of any other factors affecting its ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967) (holding that, in determining a petitioner's ability to pay, USCIS may consider factors beyond its amounts of net income and net current assets).

IV. CONCLUSION

As of the petition's approval, the record did not establish the Beneficiary's possession of the minimum experience required for the offered position and the requested classification. We will therefore affirm the revocation of the petition's approval.

ORDER: The appeal is dismissed.

Cite as *Matter of N-Y-M-, Inc.*, ID# 939116 (AAO Mar. 8, 2018)

[2] USCIS records identify the other petition by the receipt number [redacted]