U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A- CORP.

DATE: MAR. 9, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an operator of a market and deli, sought to employ the Beneficiary as a food service supervisor. It requested his classification as a skilled worker under the third-preference, immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(1), 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 first approving the petition, the Director of the Texas 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.[1]

On appeal, the Petitioner submits additional evidence and asserts the Beneficiary's qualifications for the job.

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 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 must determine 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 foreign national to fill 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.

[1] The Director initially revoked the petition concluding that the Petitioner also did not demonstrate its ability to pay the proffered wage. Further finding that the Petitioner willfully misrepresented a material fact on the accompanying certification from the U.S. Department of Labor (DOL), the Director invalidated that document. After granting later motions to reopen and reconsider by the Petitioner, however, the Director issued a new notice of intent to revoke (NOIR). Thus, the second NOIR forms the basis of the revocation at issue here.

§ 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.

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, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).[2] 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 from a petitioner - would have warranted denial. *Id.* at 451-52.

II. THE MINIMUM EXPERIENCE REQUIRED FOR THE OFFERED POSITION

A petitioner must establish a beneficiary's possession, by a petition's priority date,[3] of all DOL-certified job requirements. *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 food service supervisor as two years of experience in the offered position or as a cook.

On the labor certification, the Beneficiary attested that, before the petition's priority date, he gained only about 15 months of full-time, qualifying experience in the United States from December 1999 to June 2000 and from July 2000 to May 2001. In response to the Director's first NOIR, which the lack of two year of experience, however, the Petitioner claimed that the Beneficiary had additional, qualifying experience.

Despite these claims, the Director issued the second NOIR for good and sufficient cause. The NOIR noted that, contrary to the instructions of the labor certification, the Beneficiary did not list the additional, purported employment on the labor certification. The omission casts doubt on the Beneficiary's claimed, qualifying experience. *See Matter of Leung*,16 I&N Dec. 12, 14-15 (Distr. Dir. 1976), *disapp'd of on another ground by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (finding that an adjustment applicant's claim of qualifying experience not credible where it was

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[2] The record here indicates that the Beneficiary intended to apply for adjustment of status under the "portability" provision. *See* section 204(j) of the Act (requiring a petition to "remain valid" if a beneficiary's adjustment application is unadjudicated for at least 180 days, and he or she receives a new job offer in the same or similar occupation as the job listed on the petition). If the petition was erroneously approved, however, the Beneficiary's eligibility to port would not bar its revocation. *See Herrera v. USCIS*, 571 F.3d 881, 887 (9th Cir. 2009) (explaining that, "in order for a petition to 'remain' valid, it must have been valid from the start"); *see also Matter of Al Wazzan*, 25 I&N Dec. 359, 367 (AAO 2010) (holding that a beneficiary of a portable petition must have been "entitled" to the requested classification).

[3] This petition's priority date is September 19, 2003, the date an office within the DOL's employment service system accepted the certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

omitted from the underlying labor certification). The NOIR also pointed out inconsistencies of record regarding the Beneficiary's claimed positions and duties with former employers listed on the labor certification. Unexplained and unrebutted, these discrepancies cast significant doubt on the Beneficiary's qualifications for the position and would have warranted the petition's denial. After reviewing the Petitioner's response to the second NOIR, the Director revoked the petition's approval finding that the evidence submitted was not sufficient to establish that the Beneficiary had the required qualifying experience. For the reasons that follow, we find that the record supports the Director's decision.

On the labor certification, the Beneficiary stated that a New Jersey donut shop employed him as a "baker/counter" for about 10 months from July 2000 to May 2001. The Petitioner provided an employment verification letter, affidavits concerning the claimed experience, and some tax documents. However, this evidence indicated the Beneficiary's employment in a different position than stated on the labor certification. A letter from the employer stated that the Beneficiary worked as an "Assistant Manager." Similarly, affidavits from the employer and purported former coworkers of the Beneficiary described him as a "Supervisor." In addition, copies of the Beneficiary's federal income tax returns for 2000 identified him as a "Clerk." The differing job titles cast doubt on the Beneficiary's claimed, qualifying experience at the donut shop. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). The Petitioner also provided copies of IRS Forms W-2, Wage and Tax Statements, and payroll records indicating the donut shop's employment of the Beneficiary during the claimed period, but these documents do not substantiate the title or duties of the Beneficiary.

On appeal, the Beneficiary attests that, although he told the attorney who prepared the labor certification that he worked as an assistant supervisor, the attorney listed the Beneficiary's job title as baker/counter. The Beneficiary similarly blames his tax preparer for listing the incorrect job title of clerk on his 2000 tax returns. However, the Beneficiary's claims regarding his ignorance of the contents of the forms prepared on his behalf is not sufficient to establish that he gained the alleged qualifying experience. Moreover, on a prior labor certification filed on the Beneficiary's behalf, the Beneficiary attested that he was "unemployed" from 1998 to 2001. If the Beneficiary did not work during that period, the record does not explain why this certification states his employment at the donut shop from July 2000 to May 2001. Thus, despite the tax and payroll evidence, the record does not establish the Beneficiary's claimed 10 months of qualifying experience at the New Jersey donut store. *See Matter of Ho*, 19 I&N Dec. at 591 (holding that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence).

The Beneficiary also stated on this labor certification that he worked as a shift manager at a Pennsylvania pizza shop for about five months, from December 1999 to June 2000. The Petitioner submitted copies of Forms W-2 indicating the shop's employment of the Beneficiary in 1999 and 2000. The Form W-2 for 2000, however, indicates that the Beneficiary received only $1,588.39. That amount does not reflect five months of full-time employment in 2000 as the Beneficiary claims. Also, the Beneficiary's tax returns for 1999 and 2000 identify him as a "Cashier" and a "Clerk," not as a shift manager.

On appeal, the Beneficiary attests that he listed his occupation on his 1999 tax returns as cashier because that was his job title when he filed the returns in 2000. But the record does not explain why the Beneficiary stated on the prior labor certification that he was unemployed from 1998 to 2001 nor does it explain the low wages received when the claimed employment was allegedly full-time. As noted, the Petitioner must resolve evidentiary inconsistencies, but it has not done so here. *See id.* The record therefore does not establish the Beneficiary's claimed five months of full-time experience at the Pennsylvania pizza shop from 1999 to 2000. Based on the foregoing, we find that the record does not demonstrate the Beneficiary's possession of the experience claimed on the labor certification.

We likewise find the claims of other past employment insufficient to qualify the Beneficiary for the offered job. In response to the second NOIR and on appeal, the Petitioner states that the Beneficiary also gained experience with a New York donut shop for 10 months in 2002, a New Jersey donut shop for approximately eight months in 1999, and at an Indian bakery from March 1996 to May 1998. None of this experience was reported on the labor certification, which casts doubt on the Beneficiary's claimed, qualifying experience. *See Matter of Leung*,16 I&N Dec. at 14-15 (finding that an adjustment applicant's claim of qualifying experience not credible where it was omitted from the underlying labor certification). Moreover, as discussed below, there are numerous evidentiary discrepancies that have not been explained or overcome by the Petitioner.

The Petitioner submitted a letter and a Form W-2 indicating that a New York donut shop employed the Beneficiary as a baker for 10 months in 2002. However, on a Form G-325A, Biographic Information, submitted with his application for adjustment of status, the Beneficiary indicated that he did not live in New York in 2002. In an affidavit, the Beneficiary stated that he lived in New York when he worked at the donut shop in 2002, but that he listed his addresses on the Form G-325A as New Jersey and Massachusetts because these were his "permanent" addresses with relatives where he received mail. We are not persuaded by this explanation, given the experience's omission from the labor certification. Also, the Petitioner submitted a copy of another 2002 Form W-2 that the donut shop purportedly issued the Beneficiary. The second form identifies the Beneficiary by a slightly different name than the first form and lists his address in a different state. The second form also lists slightly different wage and tax amounts. The record does not explain the differing Forms W-2, casting doubt on their authenticity. *See Matter of Ho*, 19 I&N Dec. at 591 (holding that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence). The record therefore does not establish the Beneficiary's claimed 10 months of qualifying experience at the New York donut shop in 2002.

The Petitioner also submitted a letter and a Form W-2 indicating that a New Jersey donut shop employed the Beneficiary for about eight months in 1999. This employment, however, conflicts with the Beneficiary's prior attestation of unemployment from 1998 to 2001. The Petitioner has not addressed this inconsistency. We therefore find that the record does not establish the Beneficiary's qualifying experience at the New Jersey donut shop in 1999.

On appeal, the Petitioner also asserts the Beneficiary's qualifications based on his purported employment by a bakery in India. The Petitioner and the Beneficiary contend that he worked full-time at the bakery as a manager from March 1996 to May 1998. Although the bakery reportedly no longer conducts business, the record contains recent affidavits from its purported former owner and a former customer and co-worker of the Beneficiary. The former owner's prior 2001 letter on bakery stationery did not indicate that the Beneficiary cooked or supervised food preparation, one of the primary job duties stated on the labor certification for the offered position. In a more recent affidavit, the former owner asserts the Beneficiary's management of food preparation, stating that he did not know the letter should have listed all of the Beneficiary's duties.

The affidavits, however, are insufficient to establish the Beneficiary's claimed qualifying experience at the bakery. Because of the employment's omission from the labor certification, the Petitioner must submit more reliable evidence - such as copies of contemporaneous business records, tax filings, or government documents – to corroborate the Beneficiary's claimed experience. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). The Petitioner has not demonstrated, or even asserted, the unavailability of such evidence. *See* 8 C.F.R. § 103.2(b)(2)(i) (requiring a petitioner to demonstrate the unavailability of primary evidence before USCIS will consider secondary materials).

Because the Beneficiary listed his employment by the bakery on a prior labor certification, the Petitioner argues that the prior filing confirms his claimed, qualifying experience. The prior certification, however, does not establish the Beneficiary's requisite experience in the offered position or as a cook. Like the bakery's prior letter, the prior certification does not indicate that the Beneficiary's job duties included supervising food preparation or cooking. As such, the record does not establish the Beneficiary's claimed qualifying experience at the Indian bakery.

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

III. CONCLUSION

The record as of the petition's approval did not establish the Beneficiary's possession, by the petition's priority date, of the minimum experience required for the offered position. We will therefore affirm the revocation of the petition's approval.

ORDER: The appeal is dismissed.

Cite as *Matter of A- Corp.*, ID# 420774 (AAO Mar. 9, 2018)