U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7858311

Date: MAR. 24, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a night manager of a convenience store under the third-preference immigrant classification 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).

The Director of the Texas Service Center denied the petition. The Director concluded that the Beneficiary's prior attempt to obtain lawful permanent resident status through a fraudulent marriage barred the petition's approval.

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. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain 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). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* Labor certification also indicates that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application 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 beneficiary meets the requirements of a DOL-certified position and a requested visa classification. Finally, if USCIS grants a petition, a 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.

II. THE MARRIAGE FRAUD BAR

USCIS cannot approve a petition if a beneficiary "attempted or conspired to enter into a marriage for the purpose of evading the immigration laws." Section 204(c) of the Act. In deciding if a marriage was a sham, USCIS must examine whether there is "substantial and probative evidence" of fraud warranting a petition's denial under section 204(c) of the Act. 8 C.F.R. § 204.2(a)(1)(ii). Directors should not ordinarily give conclusive effect to prior USCIS determinations. *Matter of Samsen*, 15 I&N Dec. 28, 29 (BIA 1974) (citation omitted). Rather, they should reach their own, independent conclusions based on the evidence before them. *Id.*

Here, the Director noted that in 2005 USCIS denied an immigrant petition filed for the Beneficiary by his U.S. citizen spouse. A district director found that the Beneficiary engaged in a sham marriage. It does not appear, however, that the Director fully reviewed and independently analyzed the evidence of record. Also, if an adverse decision stems from derogatory information that a petitioner is unaware of, USCIS must first notify the business of the information and afford it an opportunity to respond. 8 C.F.R. § 103.2(b)(16)(i). Before deciding this matter, the Director issued the Petitioner a written request for additional evidence (RFE). But the RFE questioned only the Beneficiary's qualifying experience for the offered position. Contrary to 8 C.F.R. § 103.2(b)(16)(i), the RFE did not notify the Petitioner of evidence of marriage fraud or afford the company an opportunity to respond to such derogatory information.

In addition, the Director applied the marriage fraud bar to this petition without benefit of recent case law. Since the petition's denial in 2006, the Board of Immigration Appeals (BIA) has clarified that, in the context of marriage fraud, the term "substantial and probative evidence" means evidence "establish[ing] that it is more than probably true that the marriage is fraudulent." *Matter of P. Singh*, 27 I&N Dec. 598, 607 (BIA 2019).

For the foregoing reasons, we will withdraw the Director's decision and remand the matter. On remand, if the Director still finds section 204(c) of the Act applicable, he must notify the Petitioner of evidence of marriage fraud and afford the company an opportunity to respond. The Director should also reach an independent conclusion based on the evidence before him and apply current case law.

III. THE REQUIRED EXPERIENCE

Although unaddressed by the Director, the record also does not establish the Beneficiary's qualifying experience for the offered position. A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of a 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).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor

[1] This petition's priority date is May 6, 2003, the date an office in DOL's employment service system 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).

impose additional criteria. *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).

Here, the accompanying labor certification states that the minimum requirements of the offered position of night manager include neither training nor education. Rather, the labor certification states that the position requires at least two years of experience - in the job offered, as a convenience store manager, or as a "manager in any retail setting."

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than six years of full-time, qualifying experience. He stated that a U.S. convenience store/gas station employed him as a "Manager/Cashier" from March 2000 until at least the petition's priority date in May 2003. He also stated that he managed a general store in Pakistan from November 1991 to April 1994.

As proof of qualifying experience, a petitioner must submit letters from a beneficiary's former employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must include the employers' names, titles, and addresses, and describe a beneficiary's experiences. *Id.*

The Petitioner did not submit a letter from the Beneficiary's claimed U.S. employer.[2] But the Petitioner submitted letters from the owner of the Pakistani general store. While the letters would confirm the Beneficiary's claimed former position, dates of employment, and job duties, the letters contain several deficiencies and anomalies, which must be addressed on remand. The first letter was submitted with the petition on November 14, 2005, and is undated. It is on store stationery and does not indicate whether the store remains open or not. The second letter is dated December 13, 2005 and discloses that the store "is no longer in business." The letter does not address when the store closed. Whether the store reasonably issued the letters on its stationery, giving the impression that it remained open, cannot be determined without the store closing date. The letters also do not specify whether the Beneficiary worked on a full- or part-time basis, which would help in determining if he has the full two years of experience. Additionally, the letters' signatory appears to be the Beneficiary's father. The signatory's name matches that of the Beneficiary's father as listed in the Beneficiary's passport and in his application for adjustment of status. Given the foregoing deficiencies and uncertainties, letters alone from a relative in this case would not constitute sufficient independent, objective evidence of the Beneficiary's qualifying experience, and should be supported by additional evidence to corroborate the experience. The record therefore does not

[2] Evidence indicates that the Petitioner's former president/co-owner managed the U.S. convenience store/gas station that employed the Beneficiary from March 2000 until the petition's priority date in 2003. Online government records identify the Petitioner's former president/co-owner as the sole manager of the limited liability company that conducted business under the employer's name. *See* Tex. Comptroller of Pub. Accounts, "Taxable Entity Search," https://mycpa.state.txus/coa/ (last visited Mar. 19, 2020). Online government records also show that, since 2003, the Petitioner's former president/co-owner has owned the single-family home listed as the Beneficiary's address on the Form I-140. *See* Ft. Bend Cent. Appraisal Distr., "Property Search," (last visited Mar. 19, 2020). The evidence suggests a business and personal relationship between the two men that began before the filing of the labor certification application, casting doubt on the *bona fides* of the job opportunity. *See* 20 C.F.R. § 656.20(c)(8) (2004) (requiring a labor certification employer to attest that "[t]he job opportunity has been and is clearly available to qualified U.S. workers").

establish the Beneficiary's satisfaction of the minimum experience requirement of the offered position.

On remand, the Director should inform the Petitioner of the evidentiary deficiencies. The Director should also ask the company to submit independent, objective evidence of the Beneficiary's claimed qualifying experience, such as tax or contemporaneous business records.

IV. CONCLUSION

The Director did not properly apply the marriage fraud bar to the petition. The record also does not establish the Beneficiary's qualifying experience for the offered position.

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