U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7974503

Date: MAY. 1, 2020

Appeal of Vermont Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as an antique rug restorer 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 Vermont Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position and the requested classification.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

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. If USCIS grants 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.

II. THE REQUIRED EXPERIENCE

A skilled worker must perform "skilled labor (requiring at least 2 years training or experience)." Section 203(b)(3)(A)(i) of the Act. A petitioner must also demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date.[1] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum job requirements. 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).

Here, the labor certification states the minimum requirements of the offered position of antique rug restorer as an eighth-grade U.S. education, or a foreign educational equivalent, and two years of experience in the job offered. On the labor certification, the Beneficiary attested that, by the petition's priority date and before beginning work for the Petitioner in the offered position, he gained more than three years of full-time qualifying experience.[2] He stated that a rug wholesaler in Pakistan employed him as a carpet repair expert from April 1988 to October 1991.

As proof of claimed qualifying experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must include the employer's name, title, and address, and describe the beneficiary's experience. *Id.* If a letter is unavailable, USCIS will consider other documentation of a beneficiary's experience. 8 C.F.R. § 204.5(g)(1).

The Petitioner submitted a letter from the Beneficiary's claimed former employer that it appears the Petitioner may have initially provided to DOL during the labor certification process. Consistent with 8 C.F.R. § 204.5(l)(3)(ii)(A), the letter confirms the Beneficiary's former position and dates of employment, and describes his experience. The Petitioner, however, also submitted a letter to USCIS from another Pakistani rug business stating that it employed the Beneficiary as a carpet repair expert during the same period.

The Director issued a notice of intent to deny (NOID) the petition, noting that, on the labor certification, the Beneficiary did not state his simultaneous employment by two Pakistani businesses. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). The NOID also notes the Beneficiary's statement on the labor certification that the Petitioner began employing him in July 1995. On an application submitted to an Immigration Judge in 2005, however, the Beneficiary stated that he began working for the Petitioner in January 2000. He also stated that, from September 1997 to November 2000, he worked for a different U.S. carpet business.

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[1] This petition's priority date is April 23, 2002, 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).

[2] A labor certification employer generally cannot rely on experience that a foreign national gained with it, unless he or she gained the experience in a position substantially different than the offered one. 20 C.F.R. 656.21[cite] (2004). The Petitioner here does not state its reliance on the Beneficiary's experience with it.

In response to the NOID, the Petitioner submitted a letter stating that the Beneficiary's former U.S employer from 1997 to 2000 was a part of the Petitioner. The Petitioner stated that, after it closed this other business in 2000, the Beneficiary returned to work for the Petitioner. The Petitioner also claimed that, from 1988 to 1991, the Beneficiary's employment by the other Pakistani rug business was part-time in nature.

As the Director concluded, the Petitioner did not demonstrate the Beneficiary's qualifying experience for the offered position or the requested visa classification. Contrary to *Ho*, the Petitioner did not submit independent, objective evidence explaining how the Beneficiary simultaneously worked for two employers in Pakistan. Moreover, neither letter from the Pakistani businesses describes the Beneficiary's hours of employment. Thus, contrary to the Beneficiary's attestation on the labor certification, the record does not establish his full-time employment in Pakistan, either with one business or in the aggregate with both businesses.

On appeal, counsel asserts that the Beneficiary worked part-time for the Pakistani business omitted from the labor certification and that carpet employees in Pakistan often work for multiple employers at the same time. Counsel's assertions, however, do not constitute evidence. *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)). The Petitioner must substantiate counsel's statements with independent evidence, which may include affidavits or declarations. Counsel also claims that payroll records from both of the Beneficiary's purported Pakistani employers are unavailable. The Petitioner, however, did not demonstrate the unavailability of the records or attempts to obtain them. In addition, the Petitioner did not explain why the Beneficiary omitted his purported, part-time experience with the other Pakistani business from the labor certification. *See Matter of Leung,* 16 I&N Dec. 12, 14-15 (Distr. Dir. 1976), *disapp'd of on other grounds by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (rejecting claimed qualifying experience as not credible where the foreign national omitted the employment from the accompanying labor certification).

Also, the record does not establish the Petitioner's continuous employment of the Beneficiary since July 1995. The Petitioner did not submit documentary evidence to corroborate its claim that the Beneficiary worked for another part of its business from 1997 to 2000.[3] Also, the Petitioner's letter stating its claim about the other business omits the name and title of the letter's signatory, and its stationery misidentifies the Petitioner's home state. The omissions and the discrepancy undermine the letter's authenticity and veracity. In addition, the Beneficiary's application to the Immigration Judge contains a medical report stating that the Beneficiary claimed to suffer a "work related accident" in June 2000 "while driving [a] cab." Thus, the report indicates that the Beneficiary worked as a cabdriver at a time he claimed to be employed full-time in the offered position, casting further doubts on his qualifying experience and credibility.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position and the requested visa classification.

[3] Online government records indicate that the other business for which the Beneficiary worked was a separate corporation from the Petitioner. *See* N.Y. Dep't of State, Div. of Corps., "Search the Corporation & Business Entity Database," https://www.dos.ny.gov/corps/bus_entity_search.html (last visited Mar. 17, 2020).

III. THE REQUIRED EDUCATION

Similarly, the record does not establish the Beneficiary's qualifying education for the offered position. As previously indicated, the labor certification states that the offered position of antique rugs restorer requires an eighth-grade U.S. education or a foreign educational equivalent. On the labor certification, the Beneficiary attested that, by the petition's priority date, he received a high school diploma in Pakistan.

The record, however, lacks documentary evidence of the Beneficiary's foreign educational credentials. The record therefore does not establish the Beneficiary's possession of the minimum educational requirements of the offered position. In any future filings in this matter, the Petitioner must submit independent, objective evidence of the Beneficiary's possession of the foreign equivalent of at least an eighth-grade U.S. education.

IV. ABILITY TO PAY THE PROFFERED WAGE

Also unaddressed by the Director, the record does not establish the Petitioner's ability to pay the proffered wage of the offered position. 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). If a petitioner employs less than 100 people, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of antique rugs restorer as $21 an hour, or $43,680 a year based on a 40-hour work week. As previously noted, the petition's priority date is April 23, 2002.

The record lacks required evidence of the Petitioner's ability to pay the proffered wage from the petition's priority date onward. In any future filings in this matter, the Petitioner must submit copies of its annual reports, federal tax returns, or audited financial statements from 2002, the year of the petition's priority date, through 2019.

V. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum experience required for the offered position or the requested visa classification. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.