U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-S-K-D-T-H-

DATE: MAY 7, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an operator of a restaurant specializing in Korean cuisine, seeks to employ the Beneficiary as a cook. It requests her classification under the third-preference, immigrant category as an "other worker." Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This classification allows a U.S. business to sponsor a foreign national with less than two years of training or experience for lawful permanent resident status.

After the filing's initial grant, the Acting Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that U.S. Citizenship and Immigration Services (USCIS) mistakenly approved the petition, as the Petitioner did not establish the Beneficiary's possession of the minimum experience required for the offered position. Specifically, the Director found that discrepancies between the petition and the Beneficiary's prior application for a U.S. visitor's visa cast doubts on her claimed, former employment.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary has sufficiently explained the discrepancies.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further proceedings consistent with the following opinion.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an 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 a position and that employment of a foreign national will not harm 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 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.

Before a beneficiary 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).

USCIS may issue a notice of intent to revoke (NOIR) if, as of the notice's issuance, the unexplained and unrebutted record would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation lies if the record, after consideration of a petitioner's rebuttal evidence or explanations, would have warranted denial. *Id.* at 452.

II. THE REQUIRED EXPERIENCE

A petitioner must establish a beneficiary's possession, by a petition's priority date, of all DOL-certified job requirements.[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 the minimum requirements of an offered position. 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 the "DOL bears authority for setting the *content* of the labor certification") (emphasis added).

Here, the accompanying labor certification states the minimum requirements of the offered position of cook as a U.S. high school diploma or a foreign equivalent credential, and one year of experience in the job offered. On the labor certification, the Beneficiary attested that, before the petition's priority date, she gained more than two years of full-time, qualifying experience in South Korea. She stated that she worked as a cook in the cafeteria of a hat company for about 22 months, from September 2001 through June 2003. She also stated that she worked as a restaurant cook for about five months in 2000.

The Petitioner submitted a letter and affidavit from the president of the hat company. Both documents state the company's employment of the Beneficiary as a cafeteria cook from September 2001 through June 2003. *See* 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to support a beneficiary's claimed, qualifying experience with a letter from a former employer). The Director's NOIR, however, alleged that contrary statements of the Beneficiary on her 2003 application for a visitor's visa application undermine her claimed, qualifying experience.

However, the NOIR did not specify the discrepancies on the Beneficiary's visa application. *See Matter of Estime*, 19 I&N Dec. at 451-52 (requiring an NOIR to contain a "specific statement" of the evidence supporting the proposed revocation). We will therefore withdraw the Director's decision and remand the matter for the issuance of a new NOIR.

[1] This petition's priority date is October 22, 2013, the date the DOL 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).

On remand, the Director should review the Petitioner's appellate evidence and issue a new NOIR specifically identifying any evidence casting doubt on the Beneficiary's claimed, qualifying experience. The NOIR should include a detailed statement about the inconsistencies between the non-immigrant visa application and the experience claimed on the labor certification.[2] The NOIR should also notify the Petitioner of the following additional potential grounds of revocation.

III. THE NATURE OF THE BENEFICIARY'S EXPERIENCE

Even if the Petitioner establishes the Beneficiary's claimed former employment, the record as of the petition's approval did not demonstrate the qualifying nature of the experience. As previously indicated, the labor certification states that the offered position of cook requires at least one year of experience in the job offered. Experience in a job offered means experience performing the primary duties of an offered position. *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284 *2 (BALCA Oct. 24, 2011) (citations omitted). The certification here states the primary duties of the offered position as: planning tofu and Korean dishes; making and keeping tofu safe and sanitary; ordering, monitoring, and keeping fresh vegetables and ingredients; directing, supervising, and helping to prepare and season large quantities and kinds of tofu; and helping assistant cooks handle customer demands.

The letter from the hat company's president states that the Beneficiary's former duties included: planning dishes for lunch and dinner; buying groceries and ingredients; preparing and seasoning dishes; directing assistants to wash and prepare ingredients; and tasting foods. But, contrary to many of the job duties stated on the labor certification, the record did not establish that the Beneficiary ordered, kept, prepared, and seasoned tofu dishes. The record therefore did not establish the qualifying nature of the Beneficiary's experience in the job offered.

IV. THE REQUIRED EDUCATION

The record as of the petition's approval also did not establish the Beneficiary's possession of the minimum education required for the offered position. As previously indicated, the labor certification states that the offered position of cook requires a U.S. high school diploma or an equivalent foreign credential. The Beneficiary states on the certification and her resume that she attended high school

[2] We note that on appeal, the Beneficiary discloses that the hat company's president, the signatory of the letter and affidavit of record, is her brother-in-law, the spouse of her husband's sister. The Beneficiary also states that the company employed her husband.[2] Because of these family relationships between the Beneficiary and her former employer, the documents from the Beneficiary's brother-in-law do not constitute independent, objective evidence of her claimed, qualifying experience at the company. Further, the Beneficiary's brother-in-law stated that the hat company closed in 2010. But the record does not establish the unavailability of business records or other independent, objective evidence of the company's employment of the Beneficiary, such as bank records showing regular deposits of her wages, or affidavits from former supervisors or co-workers not otherwise related to the Beneficiary. *See Matter of B&B Residential Facility*, 2001-INA-00146, 2002 WL 1586297, *3 (BALCA July 16, 2002) (allowing an employer to establish a foreign national's qualifying experience based on "under-the-table" employment, but warning that such employment "may be difficult to document").

in South Korea. But these uncorroborated statements do not establish her educational qualifications. The Petitioner must submit independent, objective evidence of the Beneficiary's education, such as copies of a diploma, certificate, or other school records.

V. ABILITY TO PAY THE PROFFERED WAGE

As of the petition's approval, 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 cook as $33,000 a year. As previously noted, the petition's priority date is October 22, 2013.

The petition contained a copy of the Petitioner's federal income tax return for 2014. The return indicates that the company had sufficient amounts of net income and net current assets to pay the proffered wage in 2014. But the record as of the petition's approval in June 2015 lacked required evidence of the Petitioner's ability to pay in 2013 or 2015. The Petitioner therefore did not demonstrate its continuing ability to pay the proffered wage from the petition's priority date.

On remand, the new NOIR should notify the Petitioner of the deficiencies discussed above and any others that the Director may note. The NOIR should also afford the Petitioner a reasonable period to respond. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

VI. CONCLUSION

The NOIR lacked a specific statement of the evidence casting doubt on the Beneficiary's claimed, qualifying employment for the offered position. The record, however, does not establish the qualifying nature of the Beneficiary's experience, her possession of the minimum education required for the offered position, or the Petitioner's ability to pay the proffered wage.

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

Cite as *Matter of P-S-K-D-T-H-*, ID# 1041389 (AAO May 7, 2018)