U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF BHC-, INC.

DATE: MAY 9, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a construction company, seeks to employ the Beneficiary as a segmental paver. It requests his classification under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(1). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least two years of training or experience.

After initially granting the filing, the Director of the Texas Service revoked the petition's approval. The Director concluded that the Petitioner did not demonstrate: its required ability to pay the position's proffered wage; the Beneficiary's qualifying experience for the offered position; and the *bona fides* of the job offer or the job opportunity.

On appeal, the Petitioner asserts that the revocation was arbitrary, capricious, and an abuse of the Director's discretion. The Petitioner contends that the Director demanded excessive evidence and re-examined previously approved issues without "good cause."

Upon *de novo* review, we will dismiss the appeal.[1]

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must 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 the United States lacks sufficient able, willing, qualified, and available workers for the offered position and that employment of a foreign national in the job will not harm the wages or working conditions of U.S. workers similarly employed. *Id.*

[1] The Form I-290B, Notice of Appeal, states that, within 30 days of the appeal's filing, the Petitioner would submit a written brief, additional evidence, or both. As of this decision's date, however, more than two years after the appellate filing, we have not received any additional submissions in this matter.

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to USCIS. Section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a foreign national meets the requirements of the DOL-certified position and the requested immigrant classification. If USCIS grants a petition, a foreign national may finally apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

"[A]t any time" 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. USCIS may issue an NOIR if the unexplained and unrebutted record as of the notice's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Revocation lies if a petitioner's NOIR response does not demonstrate the petition's approvability on the alleged revocation grounds. *Id.* at 451-52.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a position's 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 tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date onward. If a petitioner did not annually pay the full proffered wage, USCIS next considers whether it generated annual amounts of net income or net current assets sufficient to pay any difference between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[2]

Here, the accompanying labor certification states the proffered wage of the offered position of segmental paver as $32,198 a year. The petition's priority date is December 22, 2010, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

As of the petition's approval in March 2014, the record contained copies of the Petitioner's federal income tax returns for 2010, 2011, and 2012. The returns reflect annual net income amounts exceeding the proffered wage for each year. The returns therefore demonstrate the Petitioner's ability to pay the proffered wage in 2010, 2011, and 2012.

[2] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

The record, however, lacked copies of the Petitioner's annual reports, federal tax returns, or audited financial statements for 2013 and 2014. Without required evidence of the Petitioner's continuing ability to pay as of the petition's approval in 2014, the record would have warranted the petition's denial. *See Matter of Estime*, 19 I&N Dec. at 451 (requiring an NOIR to allege revocation grounds that "would have warranted a denial"). The Director therefore properly issued the NOIR pointing out this deficiency and properly revoked the petition's approval on this ground after the Petitioner failed to submit the evidence required.

On appeal, the Petitioner recites evidence submitted with the original petition but does not respond to or provide evidence to overcome the deficiencies noted in the NOIR and revocation in regard to its ability to pay the proffered wage in 2013 and 2014. Rather, the Petitioner argues that the NOIR's issuance was arbitrary, capricious, and an abuse of the Director's discretion. The Petitioner asserts that the NOIR "needlessly re-examin[ed] issues which had been sufficiently proved to the satisfaction of the original adjudicator." Noting that the Petitioner filed a prior court action in this matter against USCIS, the company contends that the notice was:

> punitive in its impossibly high standard of proof, deciding that evidence which had previously been sufficient was no longer adequate, and demanding additional documents to an extent that went way beyond the usual practice for approval of third-preference skilled worker visa petitions.

The erroneous nature of a petition's approval, however, provides good and sufficient cause for the filing's revocation. *See Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Here, contrary to 8 C.F.R. § 204.5(g)(2), the petition lacked required evidence of the Petitioner's continuing ability to pay the proffered wage as of the filing's approval. Thus, USCIS erred in approving the petition, and the Director properly issued the NOIR. The NOIR therefore was neither needless, arbitrary, nor capricious. Also, the Petitioner does not cite any evidence of USCIS's alleged "punitive" issuance of the NOIR. In addition, the NOIR stated the correct standard of proof in revocation proceedings: preponderance of the evidence. *See* section 291 of the Act, 8 U.S.C. § 1361.

For the foregoing reasons, chiefly the lack of required evidence regarding 2013 and 2014, the record does not demonstrate the Petitioner's continuing ability to pay the proffered wage. We will therefore affirm the revocation on this ground.

III. THE EXPERIENCE REQUIRED FOR THE OFFERED POSITION

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered 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). 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 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 segmental paver as two years of experience in the job offered. The labor certification states that the position does not require any training or education.

On the labor certification, the Beneficiary attested that, by the petition's priority date and before his start date in the offered position with the Petitioner, he gained more than four years of full-time, qualifying experience with another U.S. construction company. He stated that he worked for his former employer from February 2005 to June 2009.

To support a beneficiary's claimed, qualifying experience, a petitioner must submit a letter from a former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must provide the employer's name, address, and title, and describe the beneficiary's experience. *Id.* The NOIR notes that the record includes three letters from the Beneficiary's claimed former employer indicating the Beneficiary's employment in the offered position. As the NOIR indicates, however, none of the letters meet the regulation's requirements. Two of the letters do not describe the Beneficiary's experience. Also, the Petitioner has not demonstrated that the third letter is from the Beneficiary's former employer. The letter is printed on the personal stationery of the employer's purported former owner, and the record lacks sufficient evidence of the owner's claimed relationship to the petitioner. If a letter from a former employer is unavailable, a petitioner may submit "other documentation relating to the alien's experience." 8 C.F.R. § 204.5(g)(1). But the Petitioner here has not claimed or demonstrated the unavailability of the required letter. As of the NOIR's issuance, the record therefore would have not have established the Beneficiary's qualifying experience for the offered position.[3]

Thus, contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the record did not establish the Beneficiary's possession of the minimum experience required for the offered position. On appeal, the Petitioner again recites the evidence submitted with the original petition but does not respond to or provide evidence to overcome the deficiencies in the evidence regarding the Beneficiary's experience. We will therefore also affirm the petition's revocation on this ground.

[3] As additional evidence of the Beneficiary's claimed, qualifying experience, the Petitioner submitted copies of his purported IRS Forms W-2, Wage and Tax Statements, from 2006 through 2009. The Forms W-2 indicate their issuance by the Beneficiary's claimed former employer. But the forms for 2006, 2007, and 2008 list a different U.S. Social Security number for the Beneficiary than stated on the other Form W-2 and on the Form I-140, Immigrant Petition for Alien Worker. The discrepancy in the Beneficiary's Social Security number, which the NOIR did not cite, casts doubt on the authenticity of the Forms W-2. *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). In any future filings in this matter, the Petitioner must explain the discrepancy in the Beneficiary's Social Security number and demonstrate the Beneficiary's claimed qualifying experience for the offered position.

IV. RESERVED ISSUES

The Director's decision also expressed concerns about the *bona fide* nature of the job offer and the job opportunity. However, because the issues previously reviewed are dispositive and the Petitioner has not shown eligibility for the benefit sought, we decline to reach the Director's additional concerns and as such reserve them.

V. CONCLUSION

The Petitioner did not demonstrate its ability to pay the proffered wage or the Beneficiary's qualifying experience for the offered position. The record therefore supports the revocation of the petition's approval. We will dismiss the appeal for the reasons stated above, with each considered an independent and alternate basis for revocation. The burden of proof to establish eligibility for the benefit sought remains with the petitioner in revocation proceedings. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); and *Matter of Estime*, 19 I&N Dec. 450, 452, n.1 (BIA 1987). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of BHC-, Inc.*, ID# 3353001 (AAO May 9, 2019)