U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16493406

Date: MAY 26, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a Japanese restaurant, seeks to employ the Beneficiary as a specialty chef. It requests classification of the Beneficiary 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)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

After the filing's initial grant, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum experience required for the offered position.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

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, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the 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.

At 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. 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 the unrebutted and unexplained record, as of the NOIR's issuance, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, USCIS may revoke a petition's approval if a petitioner's response does not overcome the grounds stated in an NOIR. *Id.* at 452.

II. EXPERIENCE REQUIRED FOR THE OFFERED POSITION

A skilled worker must be capable of "performing skilled labor (requiring at least 2 years training or experience)." Section 203(b)(3)(A)(i) of the Act. 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).[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 impose additional requirements. *See, e.g., Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states that the offered position requires a high school, or foreign equivalent, diploma and 24 months of experience "in the job offered." The labor certification states that the Petitioner will not accept experience in an alternate occupation. The duties and required skills for the offered position are stated as, "All aspects of Japanese cooking, including: plan the menu; develop recipes and menu; coordinate preparation of both traditional/modern dishes including sushi and sashimi; create rolls; apply knowledge of food safety; estimate food consumption; order supplies; etc."

On the labor certification, the Petitioner asserts that the Beneficiary completed an associate's degree in South Korea in 2015. The Petitioner also asserts that the Beneficiary gained experience as a specialty chef from May 2, 2011 to July 1, 2013 with a sashimi restaurant in South Korea. The initial evidence submitted with the petition included a letter from this claimed former employer. The letter is signed by the restaurant's President and is written in the English language, including the letterhead with the restaurant's name, address and phone number in South Korea.

The letter from the Beneficiary's claimed former employer indicates that the Beneficiary was employed as a specialty chef from May 2011 to June 2013, "in charge of the Japanese food section: planned the menu; developed recipes and menu; coordinated preparation of both traditional/modern dishes; ensured food safety and sanitation; estimated food consumption; order supplies; etc."

[1] This petition's priority date is December 6, 2016, 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).

Following the approval of the petition, the Director sent the Petitioner a NOIR stating that, upon further review, the petition was approved in error. The Director informed the Petitioner that the Beneficiary's claimed employment was inconsistent with a nonimmigrant visa application he submitted in November 2014. In his prior nonimmigrant visa application, the Beneficiary listed his present occupation as "student," and answered "No" when asked whether he was previously employed.

The Director identified additional inconsistencies regarding the Beneficiary's claimed employment that were raised during a USCIS site visit at the Beneficiary's home, and during a USCIS interview with the Petitioner's owner. These inconsistencies included:

- The Beneficiary was a full-time student from February to June 2013 while also claiming full-time, overlapping employment at the restaurant in South Korea.
- The Petitioner's owner stated to USCIS officers that the Beneficiary did not have prior experience preparing sushi and was trained on the job at the Petitioner's restaurant when he began working in 2017.
- The Beneficiary stated to USCIS officers that he did not have experience preparing sushi before he began employment with the Petitioner.

The Director noted that during the site visit, the Beneficiary explained to USCIS officers that he did not list his prior employment on his nonimmigrant visa application at the advice of others who suggested that this may slow the application process. The Beneficiary also stated that he was able to both work and study full-time because his courses at that time were not demanding and his schedule was flexible.

The Director issued the NOIR for good and sufficient cause. The prior employment information and claim to have been a student on the Beneficiary's prior nonimmigrant visa application contradicts the employment listed on the labor certification and in the experience letter. The Petitioner's and the Beneficiary's statements during the USCIS site visits present additional discrepancies regarding his employment experience. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies by independent, objective evidence pointing to where the truth lies). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* Thus, the record lacked sufficient reliable evidence of the Beneficiary's qualifying experience for the offered position or the requested visa classification.

In response to the NOIR, the Petitioner asserted that the Beneficiary was not required to have experience preparing sushi in order to qualify for the offered position, and that he met the minimum requirements as described on the labor certification with 24 months of experience as a specialty chef. The Petitioner submitted a statement that, although there were no applicants to its recruitment efforts for a specialty chef, it would have hired any applicant with 24 months of experience in Japanese cuisine.

The Director concluded that the Petitioner did not submit independent objective evidence to resolve the inconsistencies and verify the Beneficiary's qualifying employment, including with preparing sushi, and revoked the petition's approval.

On appeal, the Petitioner submits a brief from counsel, portions of its 2019 federal tax return, and evidence previously in the record. The Petitioner again asserts that the Director misinterpreted the minimum requirements for the position of specialty chef, which did not require experience in preparing sushi.

As noted above, the labor certification specifies that the Petitioner will not accept experience in a related occupation. Experience "in the job offered" means experience "performing the key duties of the job opportunity." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. at 4 (BALCA Oct. 24, 2011) (citations omitted). Two key job duties, as stated on the labor certification, are to "coordinate preparation of both traditional/modern dishes *including* sushi" and to "create rolls." (Emphasis added). The Petitioner's use of the word "including" (rather than "for example"), and the separate mention of creating rolls, demonstrates that specific knowledge of the preparation of sushi is required for the offered position. We note that both the name of the Petitioner's restaurant ( ) and the Petitioner's menu identify sushi as its signature dish. Therefore, experience in the job offered of specialty chef must include the key job duties of preparing sushi and creating rolls.

Consistent with the job duties of the offered position, the letter from the Beneficiary's former employer indicates that he "coordinated preparation of both traditional and modern Japanese dishes." But the letter does not state his experience with preparing sushi or creating rolls. Further, both the Beneficiary and the Petitioner's owner provided statements to USCIS officers that the Beneficiary did not have prior experience preparing sushi. The record, therefore, does not establish the Beneficiary's experience "in the job offered."

III. THE BENEFICIARY'S EXPERIENCE

In support 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 state the employer's name, title, and address, and "a description of . . . the experience of the alien." *Id.* If such a letter is unavailable, USCIS will consider other evidence of a beneficiary's experience. 8 C.F.R. § 204.5(g)(1).

The record includes one document to support the Beneficiary's claim of 24 months of qualifying experience – a letter, in English, from his purported former employer.[2] As the Petitioner does not provide an original Korean language version of the letter, it appears that the original letter was written and signed in English only. This casts doubt as to the identity of the letter's author, and whether the purported former employer was aware of its contents when it was signed. The use of an almost identical description of the Beneficiary's claimed experience as stated on the labor certification casts further doubt as to whether the signing individual actually prepared the letter or knew its contents. The restaurant's letterhead providing the business name, address and phone number is in English only. The restaurant is located in South Korea, where the primary written and spoken language is Korean. The letterhead in English casts further doubt on the letter's authenticity and the information contained therein.

In adjudicating immigration benefit requests, USCIS regularly reviews affidavits, testimonials, and letters from both laypersons and recognized experts. To be probative, a document must generally

[2] Although the record includes a certificate of business registration, with English translation, for the Beneficiary's purported former employer, this certificate does not demonstrate the Beneficiary's employment or experience.

provide: (1) the nature of the affiant's relationship, if any, to the affected party; (2) the basis of the affiant's knowledge; and (3) a specific - rather than merely conclusory - statement of the asserted facts based on the affiant's personal knowledge. *Matter of Chin*, 14 I&N Dec. 150, 152 (BIA 1972); *see also* 8 C.F.R. § 103.2(b)(2)(i) (requiring affidavits in lieu of unavailable required evidence from "persons who are not parties to the petition who have direct personal knowledge of the event and circumstances"); *Matter of Kwan*, 14 I&N Dec. 175, 176-77 (BIA 1972); *Iyamba v. INS*, 244 F.3d 606, 608 (8th Cir. 2001); *Dabaase v. INS*, 627 F.2d 117, 119 (8th Cir. 1980). A petitioner may submit a letter or affidavit that contains hearsay or biased information, but such factors will affect the weight to be accorded the evidence in an administrative proceeding. *See Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Here, the Petitioner relies only on testimonial evidence from the Beneficiary's purported former employer to establish his claimed employment experience, without providing independent, objective evidence in support of this testimony. Based on the anomalies of the letter written in English with letterhead in English, as well as inconsistencies in the Beneficiary's interview statements, and conflicting information from his nonimmigrant application, further independent evidence is required. The record does not include the Beneficiary's income tax or payroll records to corroborate his claimed employment, or school records documenting his claimed class hours during the period in question. Nor does the Petitioner assert that these records are unavailable for any reason. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

As the inconsistencies in the record have not been resolved, the Petitioner has not established with independent, objective evidence that the Beneficiary possesses the required 24 months of experience in the offered position, as required by the labor certification. The Director properly revoked the approval of the petition on this basis.

ORDER: The appeal is dismissed.