U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF SMJG- CORP.

DATE: NOV. 15, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a real estate business, seeks to employ the Beneficiary as a development manager. It requests classification of the Beneficiary as a professional or skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A), 8 U.S.C. § 1153(b)(3)(A). This professional classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status. The skilled worker classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.[1]

The Director of the Nebraska Service Center initially approved the petition, but later issued a notice of intent to revoke the approval (NOIR). Subsequently, the Director revoked the petition's approval. The Director found that the Petitioner submitted evidence demonstrating that the Beneficiary's educational credentials were not earned through a valid institution of higher education. The Director concluded that because the Petitioner did not establish the validity of the Beneficiary's educational credentials, the Petitioner did not demonstrate that the Beneficiary was qualified for the offered job. The Director determined that the submission of questionable educational documents also cast doubt on the other evidence submitted with the petition, including the evidence submitted to verify the Beneficiary's experience.

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[1] The Petitioner initially requested classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status. In a letter submitted with the petition, the Petitioner former counsel submitted educational documentation from [redacted] and a credentials evaluation and stated that "the beneficiary is the recipient of educational degrees from [redacted] both bachelor's and master's degrees in Business Administration." He further stated that the Beneficiary "should therefore be designated as a member of the professions with an advanced degree in that he has at least five years of post-graduate employment experience, thereby qualifying him for the EB-2 classification sought herein." In response to the Director's request for evidence, the Petitioner requested the amended classification of the Beneficiary as "a professional or a skilled worker." In our July 17, 2012, appeal decision, we analyzed the petition under both the professional and skilled worker classifications, and determined that the petition could not be approved under either classification.

The Petitioner appealed the Director's decision and we dismissed that appeal, as well as four subsequent motions to reopen and motions to reconsider, affirming the Director's decision and further finding that the Petitioner had not established its ability to pay. The matter is now before us again on a motion to reopen and motion to reconsider.

On motion, the Petitioner asserts that we misapplied the law, policy, and procedure resulting in an erroneous decision. It states that the Director rejected the Beneficiary's education based on evidence that was not credible; that we improperly analyzed the labor certification requirements; that a notice of intent to deny (NOID) should not have been issued in this case; and that it has established its continuing ability to pay the proffered wage.

Upon review, we will deny the motion to reopen and the motion to reconsider.

I. LAW AND ANALYSIS

A. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' (the Board) definition of "new" at 8 C.F.R. § 1003.23(b)(3) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean facts that are relevant to the issues raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

The Petitioner presents no new facts or evidence on motion, and has not shown proper cause to reopen the proceeding. *See* 8 C.F.R. § 103.5(a)(1). Therefore, the motion to reopen is denied.

B. Motion to Reconsider

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

On motion, the Petitioner states that the Director rejected the Beneficiary's education at [redacted] England, based on evidence that was not credible, and that the Petitioner did

not have an opportunity to rebut the allegations against [redacted] However, the Petitioner did have a chance to rebut the allegations in the NOIR. Yet in response to the NOIR, on appeal, and in its subsequent motions, the Petitioner has provided no evidence to establish that [redacted] is a valid institution of higher education. Therefore, the Petitioner's claims are without merit.

On motion, the Petitioner also states that we improperly analyzed the labor certification's educational requirements. The Petitioner stated the following educational requirements for the offered position on the labor certification:

- Grade School – 8 years;
- High School – 4 years;
- College – 6 years;
- College Degree Required (specify) – Master's Degree*; and
- Major Field of Study – Management or Business Administration.

The Petitioner defined the asterisk in the college degree block as "*In alternative, employer will accept 10 years of managerial experience involving applicant in increasingly high levels of authority & supervision." The Beneficiary did not list any education on the labor certification.[3] The record does not contain any evidence that the Beneficiary attended grade school. Thus, the record does not establish that the Beneficiary completed eight years of grade school as required by the labor certification.

Further, the record contains a statement of marks dated July 7, 1977, from the [redacted] India, for [redacted] showing that he completed his higher secondary (one-year course) examination. Nothing in the record establishes that the [redacted] listed on the marks sheet is the Beneficiary, [redacted] The Beneficiary did not list a middle name or alias on any documents submitted to the record. Further, even if the marks sheet belongs to the Beneficiary, it establishes only one year of secondary education. The labor certification requires four years of high school education. Thus, the record does not establish that the Beneficiary completed four years of high school as required by the labor certification.

Further, the record does not establish that the Beneficiary completed six years of college education. As noted in our prior decisions, the plain language of the labor certification indicates that an applicant must have eight years of grade school education, four years of high school education, six years of college education, *and* either a master's degree in management or business administration or

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[2] The Director noted in the NOIR that a "search of publicly available internet resources indicates that [redacted] is not an institution of higher education and is considered a 'Diploma Mill'."

[3] The Beneficiary's experience, without such fact certified by the Department of Labor (DOL) on the labor certification, lessens the credibility of the evidence and facts asserted. *See Matter of Leung*, 16 I&N Dec. 12, 14-15 (Dist. Dir. 1976).

[4] We note that the record contains a letter from [redacted] stating that the Beneficiary worked as an executive trainee and manager of construction from June 1976 to July 1990. It is unclear how the Beneficiary worked for [redacted] and also attended secondary school in 1976 and 1977.

10 years of managerial experience involving applicant in increasingly high levels of authority and supervision, to qualify for the proffered job.[5] As was discussed at length in our prior decisions, the Petitioner has not demonstrated that the Beneficiary is qualified for the job offered. On motion, the Petitioner does not submit any pertinent precedent or adopted decision, statutory or regulatory provision, or statement of policy to establish that our interpretation of the labor certification is incorrect. As such, the Petitioner's claim that we improperly analyzed the labor certification requirements is without merit.

On motion, the Petitioner also states that a NOID should not have been issued in this case. It is not clear if the Petitioner is referring to the NOID issued by our office in this matter, or if it is referring to the Director's NOIR. We will address both.

Regarding the NOID issued by our office, if the evidence in the record does not establish eligibility for the requested immigration benefit, we may deny the motion; request more information or evidence from the Petitioner; or notify the Petitioner of our intent to deny the motion.[6] We properly issued a NOID in this case on January 20, 2015, as the evidence in the record did not establish the Petitioner's and the Beneficiary's eligibility for the requested immigration benefit.

Further, the Director properly issued an NOIR pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for good and sufficient cause when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The Director stated in the NOIR that the Petitioner's submission of questionable educational documents cast doubt on the veracity of other evidence submitted with the petition. The Director's NOIR sufficiently detailed the evidence that, if unexplained and unrebutted, would warrant a denial of the visa petition. Thus, the Petitioner's assertion that a NOID should not have been issued in this case is without merit.

On motion, the Petitioner also states that it has established its continuing ability to pay the proffered wage. In this case, the priority date is July 30, 2003, and the proffered annual wage is $64,045.80 (based on an hourly wage of $35.19 and a claimed 35-hour work week). We analyzed the Petitioner's ability to pay the proffered wage in our prior decision. The Petitioner has not established that it had the ability to pay the difference between the annual proffered wage and the amounts it paid the Beneficiary for the year 2003 based on its net income or net current assets. On motion, the Petitioner submits a copy of its response to our NOID and asserts that it has the ability to pay the proffered wage based on the totality of the circumstances.

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[5] In addition to the educational requirements, the labor certification also requires six years of experience in the job offered or in the related occupation of manager (general).

[6] *See* 8 C.F.R. § 103.2(b)(8), (11), (13)-(14), (16); *see also* USCIS Policy Memorandum PM-602-0085, *Requests for Evidence and Notices of Intent to Deny* (June 3, 2013), https://www.uscis.gov/laws/policy-memoranda.

Pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets. As in *Sonegawa*, we may consider such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage.

The Petitioner asserted in response to our NOID that it has been in business for 29 years and that "a single year of poor financial performance does not disprove a company's ability to pay, especially when the company shows it financially rebounded from the poor year." The Petitioner stated that it invested money in renovations of and improvements to three properties in 2002 and 2003, and that this investment was discretionary and not necessary for the business to generate revenue. The Petitioner noted that expenses of $202,187 recorded on Line 16 of Form 8825 were unusually high in 2003 and that they have not reached this level since. We stated in our most recent motion decision that the record does not include the Petitioner's 2002 tax return to support the position that the expenses in 2003 were uncharacteristic. The Petitioner did not submit its 2002 return with this motion. Further, we stated in our most recent motion decision that there is no evidence in the record to support the purchase of the additional properties or that the Petitioner's decision to make improvements was discretionary. The Petitioner did not submit additional evidence with this motion. If the Petitioner had chosen to delay or not make the improvements to the properties, presumably the properties would not have generated the rental income claimed in 2004. The Petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). It has not done so here.

In addition, while the Petitioner indicated in response to our NOID that a shortfall in a single year should be overlooked "when the company shows it financially rebounded from the poor year," the Petitioner has not shown how it had financially rebounded. The Petitioner had a net loss in every year except 2004 and 2006, and it had net current liabilities in every year except 2014. This is an indication that 2004, the year in which the Petitioner claims it financially rebounded, is the anomaly, rather than 2003, which reflects net loss and net current liabilities similar to other years. The Petitioner did not submit relevant, probative, and credible evidence with this motion to establish that it financially rebounded from a single poor year. *Id.*

In support of its ability to pay the proffered wage in the totality of the circumstances, the Petitioner also asserted in response to our NOID that it "has been consistently increasing wages." However, the Petitioner's tax returns reveal that the wages and salaries paid by the company have fallen from 2003 to 2014. Further, the Petitioner has reduced its workforce from 4-5 employees in 2005 to 0-1 employee since 2008.[7] With this motion, the Petitioner did not submit relevant, probative, and

[7] The Petitioner indicated on the labor certification that the Beneficiary will supervise 15-25 employees, but the evidence in the record does not support that assertion. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support

credible evidence to establish that it has been consistently increasing wages. *Chawathe*, 25 I&N Dec. at 376. Further, unlike in *Sonegawa*, the Petitioner has not established its reputation in its industry.

The Petitioner's financial documents in the record are not sufficient to establish its ability to pay the proffered wage in 2003. Assessing the totality of the evidence provided in this case, we conclude that the Petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date onward.

On motion, the Petitioner has not demonstrated that our prior decision was based on an incorrect application of law or policy based on the record at the time of that decision, nor has the Petitioner established eligibility for the benefit sought. Therefore, the motion to reconsider is denied.

II. CONCLUSION

The Petitioner has not shown proper cause for reopening or reconsideration of this matter. Further, the Petitioner has not established that the Beneficiary is qualified for the offered position or that it has the continuing ability to pay the proffered wage.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of SMJG- Corp.*, ID# 347297 (AAO Nov. 15, 2017)

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of the requested immigration benefit. *Id.*