U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11931649

Date: NOV. 27, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, a home healthcare business, seeks to employ the Beneficiary as a clinical program development strategist. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center revoked the approval of the petition, concluding that the Petitioner did not establish that the Beneficiary possessed the required experience for the offered position.

The Petitioner bears the burden of establishing eligibility for the requested immigration benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the appeal for the issuance of a new decision.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification

application for processing. *See* 8 C.F.R. § 204.5(d). In this case, the priority date is December 12, 2018.

USCIS may revoke its prior approval of an immigrant visa petition "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. Revocations under 8 C.F.R. § 205.2 may be made only after issuing a notice of intent to revoke (NOIR) to the petitioner which provides the opportunity to submit evidence in support of the petition and in opposition to the alleged grounds for revocation. If the petition approval is revoked, the director must provide the petitioner with a written decision that explains the specific reasons for the revocation. *Id.*

A NOIR is issued for "good and sufficient cause" if the record of proceeding at the time of issuance would warrant the denial of the petition. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, the approval of the petition is properly revoked if the record (including any NOIR response submitted by the petitioner) warrants the denial of the petition. *Id.* at 452; *see also Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (the realization by the director that the petition was approved in error may be good and sufficient cause for revoking its approval).

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. REVOCATION OF IMMIGRANT VISA PETITION APPROVAL

The labor certification in this case states that the offered position requires a bachelor's degree in physiology and 24 months of experience in health education or health management. The Beneficiary's qualifying education is listed on the labor certification as a bachelor's degree in physiology from [redacted] University in Nigeria, awarded in 2010. The labor certification also states that the Beneficiary worked 40 hours per week as a lecturer (health promotion/education) at [redacted] College of Health Technology, Nigeria from November 1, 2012 to November 20, 2016. This is the only potentially qualifying experience listed on the labor certification.

The petition contains an employment experience letter by [redacted] on [redacted] College of Health Technology letterhead, which attests to the Beneficiary's full-time employment as a lecturer as well as a copy of his college diploma and an educational equivalency evaluation stating that his bachelor's degree in physiology is the foreign equivalent of a U.S. bachelor's degree.

The Director approved the immigrant visa petition and then revoked its approval approximately seven months later. In this case, the director's NOIR was properly issued for "good and sufficient cause" as it raised at least one potential ground for revocation that, if unrebutted, would warrant the denial of the petition. Specifically, the NOIR stated that the Beneficiary did not possess the claimed experience for the offered position.[1]

[1] The NOIR also stated that the Petitioner did not establish its ability to pay the proffered wage and that the Petitioner did not fully comply with the notice requirements for the labor certification process under 20 C.F.R. § 656.10. After reviewing the Petitioner's NOIR response (which included multiple Releases and Satisfaction of Judgments from the Ohio Department of Taxation), the Director concluded that the Petitioner had met its burden of proof for these issues.

Regarding the Beneficiary's experience, the NOIR noted that the Beneficiary's prior visa applications stated that he was employed as a logistics manager for [redacted] from 2009 to 2015. In addition, on a subsequent application and interview, where the Beneficiary claimed that he was employed as an assistant lecturer of physiology, it was reported that the Beneficiary was unable to demonstrate a basic understanding of physiology. The NOIR also stated that the Beneficiary had claimed to be a farmer in a prior visa application. Finally, the NOIR stated that USCIS attempted to verify the Beneficiary's employment using the contact information on the employment experience letter, but the school did not respond.[2]

The Petitioner's brief in response to the NOIR contained the names and addresses of two additional references who could purportedly verify the Beneficiary's employment. The response also confirmed that the Beneficiary worked for [redacted] Specifically, the Petitioner claimed that the Beneficiary worked for [redacted] (where the Beneficiary was at the location only on the weekends "with remote work during the weekdays") while employed full-time by [redacted] College of Health Technology.[3] The brief also states that the Beneficiary had worked as a farmer, but that it was only for one hour per day for family's business.[4]

In support of the brief, the NOIR response contained a new employment verification letter from [redacted] on [redacted] College of Health Technology letterhead. The letter, which contains a yahoo.com email address for the author, states that the author was not aware of any attempt to contact him by USCIS and reasserted that the Beneficiary worked 40 hours per week as a lecturer from November 2012 to August 2016. This August 2016 end date differs from the November 2016 end date stated on his prior employment letter and at section K of the labor certification. The NOIR response also contains a letter on [redacted] letterhead from [redacted] HR/Sales Representative, stating that the Beneficiary was employed as a part-time "Logistic Manager" where he worked remotely during the week and on-site during weekends from August 2009 until June 2015. The letter does not state the hours per week that the Beneficiary worked in this position.

After reviewing the Petitioner's NOIR response, the director revoked the approval of the petition. The decision concludes that the Petitioner did not resolve the inconsistencies pertaining to the Beneficiary's employment history with independent, objective evidence and therefore did not establish that the Beneficiary possessed the required experience for the offered position. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (a petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies). We find that, based on the evidence in the record before the Director, the approval of the petition was revoked for good and sufficient

[2] The employment experience letters submitted with the petition and the NOIR response contain a yahoo.com email address for the school and the author.

[3] The brief also states that the Petitioner did not list the Beneficiary's employment with [redacted] because he stopped working there over three years prior to the filing date of the labor certification and therefore it was not required to be disclosed. Section K of the labor certification, titled "Alien Work Experience," states: "List all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification." The brief does not explain why the Beneficiary's employment as a farmer was not disclosed, or whether the Beneficiary engaged in any other employment in the three years prior to the filing date of the labor certification.

[4] Assertions of counsel 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)). Counsel's statements must be substantiated in the record with independent evidence.

cause because the Petitioner failed to adequately resolve the inconsistencies in the Beneficiary's claimed employment experience with independent, objective evidence. The two employment letters from [redacted] College of Health Technology have different end dates of employment. The employment letters do not sufficiently address how the Beneficiary was able to work full-time for [redacted] College of Health Technology and part-time for [redacted] such as explaining the number of hours the Beneficiary worked each week for [redacted] and how he performed his duties remotely during the week. The Petitioner did not explain why the Beneficiary was unable to answer basic questions about physiology in his visa interview.

On appeal the Petitioner submits the Beneficiary's tax record of [redacted] Internal Revenue Service, showing his tax income and deductions for 2012 to 2016 for employment with [redacted] College of Health Technology; and a taxpayer assessment register from the [redacted] Government Internal Revenue Service showing the Beneficiary's income and tax paid for 2012 to 2016, but does not state the name of any employer. Finally, the appeal contains a letter from the National Youth Service Corps of Nigeria to [redacted] College of Health Technology stating that the Beneficiary would be assigned there for one year of "National Service."

Since the Director has not had an opportunity to review this new evidence, we are remanding this matter to the Director to determine whether or not the documents resolve the inconsistencies in the record relating to the Beneficiary's qualifying employment experience and establish that the Beneficiary has the required experience for the offered position. On remand, the Director should request updated evidence of the Petitioner's ability to pay the proffered wage as well as an explanation for the basis of the former tax judgments against the company by the Ohio Department of Taxation.[5] The Director should also request evidence establishing that the Petitioner is not currently subject to any state or federal tax liens that may impact the Petitioner's ability to continue operations or pay the proffered wage.

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

[5] The Petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the Beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). In this case, the Petitioner's 2019 federal income tax return was not yet due as of the petition filing date.