U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-J-C-O-N-Y-

DATE: NOV. 29, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a church, seeks to employ the Beneficiary as a church music director. 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 record did not establish, as required, that the Beneficiary possessed the required experience for the offered job. On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary has the experience required for the offered job.

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

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is August 14, 2015. *See* 8 C.F.R. § 204.5(d).

II. REVOCATION OF A PETITION'S APPROVAL

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Good and sufficient cause exists to issue a notice of intent to revoke (NOIR) where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

III. THE BENEFICIARY'S EXPERIENCE

The Director revoked the petition's approval because the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

In this case, the labor certification requires a bachelor's degree in music and 24 months of experience in the job offered of church music director.[2] Regarding the Beneficiary's experience, the labor certification states that the Beneficiary qualifies for the offered position based on experience as a church music director (40 hours per week) with [redacted] Church, in [redacted] South Korea, from September 1, 2006, to October 30, 2009. Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3).

With the petition, the Petitioner submitted a certificate of work experience issued May 10, 2016, attesting to the Beneficiary's experience as a church music director at [redacted] Church in South Korea from "Sept. of 2006 to June of 2009." The church's name and address appear to be written in Korean and translated into English on the top of the certificate. The text of the certificate is written solely in English and the certificate was signed by the senior pastor of [redacted] Church.

In the first NOIR, the Director indicated, in part, that information provided by the Beneficiary in his adjustment of status interview conflicts with the information provided on the labor certification in this case. Specifically, the Director stated that the Beneficiary indicated under oath in his adjustment interview that he did not have the amount of experience indicated on the certificate of work experience from [redacted] Church. In response to the NOIR, the Petitioner asserted that the Beneficiary stated during his adjustment of status interview that he "worked mostly on Saturdays and Sundays from morning to night and 2-3 hours a day during the weekdays." It asserted that the Beneficiary's "unconventional work hours should not have any bearing on the factual employment period of the beneficiary with [redacted] Church." It submitted a sworn statement of the Beneficiary indicating that

[2] The Beneficiary has the required education.

he worked as a church music director for [redacted] Church from "September of 2006 to June of 2009." The Beneficiary asserted in the statement that his weekly salary was "around 400,000 Korean Won" and that he was paid in cash.

In his second NOIR, the Director clarified the Beneficiary's testimony during his adjustment of status interview, where the Beneficiary stated that he gained experience at [redacted] Church from September of 2006 to June of 2009, on Saturdays, in the afternoons for about an hour, and for an hour to an hour and a half on Sundays. The Director noted that neither the Beneficiary's written statement nor the certificate of work experience from [redacted] Church indicates that the Beneficiary worked full-time.

In response to the second NOIR, the Petitioner submitted another certificate of work experience dated March 18, 2019, from the senior pastor of [redacted] Church. Similar to the first certificate, the church's name and address appear to be written in Korean and translated into English on the top of the new certificate, and the text of the certificate is written solely in English.

The new certificate of work experience states that the Beneficiary worked as a church music director for [redacted] Church from September of 2006 to June of 2009 and had the following work schedule:

- Saturdays: from 9AM to 7PM
- Sundays: from 8AM to 1PM and after Sunday services and lunch, directed choir practices from 3PM to 7PM
- Mondays: off
- Tuesdays: from 5PM to 7PM
- Wednesdays to Thursdays: from 5PM to 8PM
- Fridays: from 5PM to 10PM (Directing choir during weekly Friday night worship service)

In its NOIR response, the Petitioner asserted that the Beneficiary worked 32 hours per week based on the schedule detailed in the new certificate, and that his employment should be considered full-time. In support of this assertion, the Petitioner submitted a website printout indicating that according to the Internal Revenue Service, for purposes of the Affordable Care Act, full-time employment is defined as a worker who is employed at least 30 hours per week.

The Director revoked the approval of the petition, finding that the record does not establish that the Beneficiary has the required 24 months of experience in the job offered. He noted that although the Petitioner claimed that the Beneficiary worked 32 hours per week, no additional evidence beyond the new certificate from [redacted] Church was submitted to support the Petitioner's claim. He found that the Beneficiary's individual statement was not independent, objective evidence of his employment. He indicated that the Petitioner must resolve the inconsistencies in the record with independent, objective evidence pointing to where the truth lies, and that the Petitioner has not submitted any independent, objective evidence resolving the inconsistencies in the Beneficiary's experience. *See Matter of Ho*, 19 I&N Dec. at 591-92.[3]

[3] Evidence that a petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not generally be considered independent and objective evidence. Independent and objective evidence of the Beneficiary's prior employment would be contemporaneous with that employment.

On appeal, the Petitioner asserts that the Beneficiary's "official wage records" are not available because South Korean tax laws do not require workers to pay taxes on income earned from religious organizations. Thus, it states that "most, if not all of religious organizations in South Korea, including [redacted] Church, do not keep official payroll records of wage payments or tax records of their employees."[4] It provided foreign language excerpts with English translations of the relevant South Korean tax laws. The Petitioner states that it submitted the employer's work verification certificates, which it asserts are the best secondary evidence available of the Beneficiary's prior experience. *See* 8 C.F.R. § 103.2(b)(2)(i). It asserts that the Director "unjustifiably refuses to give any weight to any of the genuine evidence" that was submitted in support of the Beneficiary's purported employment with [redacted] Church. It asserts that the Beneficiary has 33 months of full-time employment based on his 32 hour work-week between September of 2006 to June of 2009 and, therefore, that the Beneficiary has the required experience for the offered job.

We agree with the Director that the Petitioner has not established that the Beneficiary has the required experience for the offered job. First, the experience certificates from [redacted] Church do not verify the same employment that was listed for the Beneficiary on the labor certification. The labor certification indicates that the Beneficiary worked 40 hours per week as a church music director with [redacted] Church, from September 1, 2006, to October 30, 2009. However, both certificates from [redacted] Church indicate that he worked from September 2006 to June 2009, not October 30, 2009, as indicated on the labor certification. Further, the second certificate from [redacted] Church indicated that the Beneficiary worked 32 hours per week, while the labor certification states that he worked 40 hours per week. Therefore, the certificates conflict with the Beneficiary's representations on the labor certification and are not credible evidence of his experience with [redacted] Church.[5] Similarly, the sworn statement of the Beneficiary is not credible. It indicates that he worked as for [redacted] Church from "September of 2006 to June of 2009," yet he stated on the labor certification that he worked there from September 1, 2006, to October 30, 2009.

Further, both certificates from [redacted] Church appear to state the church's name and address in English and Korean, but the text of the letters are written solely in English. A full English language translation must accompany any document containing foreign language. 8 C.F.R. § 103.2(b)(3). The translator must certify that the translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.* There is no certification of the translations contained on the certificates. Further, if the certificates are actually English translations of documents written entirely in the Korean language, the original Korean language documents and the required translation certifications were not submitted to the record. For this additional reason, the experience certificates are not credible evidence of the Beneficiary's work experience and are not the "best secondary evidence" of the Beneficiary's prior work experience as claimed by the Petitioner.

In addition, the Petitioner's responses to the two NOIRs do not match. In response to the first NOIR, the Petitioner asserted that the Beneficiary "worked mostly on Saturdays and Sundays from morning

[4] It is not clear whether South Korean religious organizations and/or their employees are exempt from contributing to social insurance programs, which would require payroll documentation relating to workers' earnings.

[5] The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

to night and 2-3 hours a day during the weekdays." However, in response to the second NOIR, it asserted that he had Mondays off, worked five hours every Friday night, worked Saturdays and Sundays, and worked 2-3 hours each night on Tuesdays, Wednesdays, and Thursdays. Additionally, on the Beneficiary's G-325A, Biographic Information form, signed by him on April 12, 2016, and submitted with his adjustment of status application, he certified that he had never been employed abroad. This conflicts with the information provided on the labor certification and with the evidence submitted in this case. The Petitioner has not resolved the inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Based on the inconsistencies and discrepancies discussed above, the Petitioner has not demonstrated that the employment history claimed on the labor certification is correct. We agree with the Director's determination that the evidence submitted to the record regarding the Beneficiary's prior work experience with [redacted] Church is not credible. The Petitioner has not resolved the inconsistencies and ambiguities regarding the Beneficiary's experience with [redacted] Church with independent, objective evidence, such as paystubs, payroll records, personnel records, employment agreements, and/or bank records. Thus, the Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date. We therefore affirm the Director's determination that the Beneficiary did not have the required two years of experience as a church music director.

We additionally note that the Beneficiary previously submitted a student nonimmigrant visa application in December 2010. On the application, he certified that he was currently employed as an artist/performer with the [redacted] Orchestra in South Korea. He also certified that he had been previously employed from February 1, 2007, to September 30, 2010, as a tuba musician with the [redacted] Orchestra. He did not list either of these employers on the labor certification in this case or on his Form G-325 submitted with his adjustment of status application. Further, he did not list his purported employment with [redacted] Church on the nonimmigrant visa application.[6] The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Although this derogatory information from the Beneficiary's nonimmigrant visa application does not form part of the basis for this decision, the Petitioner must address this issue in any future filings. *See* 8 C.F.R. § 103.2(b)(16)(i).

IV. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of T-J-C-O-N-Y-*, ID# 6255260 (AAO Nov. 29, 2019)

[6] It is not clear how he could have been employed concurrently with the [redacted] Orchestra and [redacted] Church starting on February 1, 2007.