U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10792738

DATE: SEPT. 3, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an "Other Worker"

The Petitioner, a janitorial business, seeks to employ the Beneficiary as an administrative assistant. It requests "other worker" classification for the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish that the Beneficiary had the requisite experience to meet the terms of the labor certification and to qualify for the requested visa classification.

On appeal the Petitioner asserts that the Director's decision was erroneous because it did not properly review previously submitted evidence. The Petitioner submits additional documentation and asserts that the evidence of record establishes that the Beneficiary has the requisite experience to meet the terms of the labor certification and qualify for "other worker" classification.

In visa petition proceedings it is the Petitioner's burden to establish eligibility for the requested benefit. See section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal

I. LAW

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). See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). 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 may 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.

II. ANALYSIS

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(D) states that "[i]f the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification." All requirements must be met by the petition's priority date,[1] which in this case is June 27, 2019. See Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

The labor certification in this case specifies the following in section H (Job Opportunity Information) regarding the requirements for the job of administrative assistant:

4.	Education: Minimum level required:	None
5.	Is training required for the job?	No
6.	Is experience in the job offered required?	Yes
6-A.	How long?	12 months
8.	Is an alternate combination of education and experience acceptable?	No
10.	Is experience in an alternate occupation acceptable?	No
11.	Job Duties:	

Maintain physical and electronic files or other organizational system;
Keyboard and perform accurate data entry;
Operate office equipment such as computers, photocopiers, fax machines and scanners;
Answer telephones and deliver messages;
Maintain and ensure accuracy of daily workforce reports, and ensure that daily timesheets correlate correctly;
Take inventory of equipment and supplies and work with vendors to coordinate receiving supplies;
Prepare invoices or budgetary requests;
Perform other duties as assigned by the supervisor.

No specific skills or other requirements are listed in section H.14. Thus, the only requirement to qualify for the proffered position is 12 months of experience as an administrative assistant. Sections J and K of the labor certification assert that the Beneficiary met this experience requirement in an administrative assistant job with [redacted] in [redacted] Massachusetts, starting on "04/07/2015" and ending on "09/30/2016." As described in the labor certification, the Beneficiary's job duties at [redacted] were exactly the same as the job duties of the proffered position in this petition.

The Petitioner's initial evidence included a letter from the owner/president of [redacted] which stated that the Beneficiary was employed as a full-time administrative assistant "from 07/04/2015 to 09/30/2016" and described her job duties in identical language to that on the labor certification.

[1] The priority date of a petition is the date the underlying labor certification is filed with the DOL. See 8 C.F.R. § 204.5(d).

The Director issued a notice of intent to deny (NOID), stating that the starting date for the Beneficiary's employment with [redacted] as indicated on the labor certification, which the Director identified as "April 07, 2015," did not match the starting date for that employment as indicated in the letter from [redacted] which the Director identified as "July 04, 2015." The Director also pointed out that the Beneficiary's date of last arrival in the United States, as indicated on the labor certification, was April 6, 2015, which cast doubt on the claim that the Beneficiary started work with [redacted] the very next day, or had any work experience with that business. The Petitioner was advised to submit independent, objective documentary evidence to overcome the discrepancies described above and to verify the Beneficiary's employment history.

In response to the NOID the Petitioner asserted that the correct starting date for the Beneficiary's alleged employment with [redacted] was July 7, 2015, and that the inconsistent starting dates in the labor certification and the letter from [redacted] were the result of a clerical error in the labor certification. According to the Petitioner, the labor certification was prepared by a paralegal who reversed the month and day of the employment start date from 07/04 to 04/07. In support of this claim the Petitioner submitted a letter from counsel's legal assistant who stated that he filled out the labor certification application in this case and "accidentally inverted the month and day [the Beneficiary] began working for her prior employer, [redacted], and typed 04/07/2015 instead of 07/04/2015." The legal assistant attributed his mistake to "being from Italy" where the standard format for indicating a date is day/month/year rather than the U.S. format of month/day/year.[2]

The Petitioner submitted other evidence as well in response to the NOID, including a letter from the current owner of [redacted] who stated that he purchased the business in November 2019 and received confirmation from the previous owner that the Beneficiary was employed as an administrative assistant from July 7, 2015, to September 30, 2016. According to the current owner, no employment records were available because the Beneficiary did not have a Social Security number, the Beneficiary was paid monthly with company checks, and no evidence of those checks could be produced because all bank accounts associated with past ownership had been closed. The Petitioner also submitted a statement from the Beneficiary who confirmed that she entered the United States on April 6, 2015, claimed that she worked for [redacted] as a full-time administrative assistant from July 7, 2015, until September 30, 2016, and referred to photocopies she submitted of five [redacted] checks from [redacted] to the Beneficiary, totaling $6,500, that were dated and cashed between August and December 2015. According to the Beneficiary, [redacted] cannot produce copies of any subsequent checks issued to her because "it changed ownership and the bank accounts have been closed," and no Form W-2 or Form 1099 was ever issued to the Beneficiary because she had no Social Security number.

The Director denied the petition, concluding that the documentation submitted by the Petitioner was insufficient to resolve the discrepancies discussed in the NOID and to establish that the Beneficiary had at least 12 months of qualifying experience.

[2] Despite the legal assistant's claim that he mistakenly followed the Italian format of day/month year for the Beneficiary's starting date at [redacted] we note that all other dates he entered in the labor certification appear to follow the U.S. format of month/day/year.

On appeal the Petitioner reiterates its contention that the inconsistent starting dates given for the Beneficiary's alleged employment with [redacted] was due to a scrivener's error in the labor certification, and that the error was immaterial in any event because even though the Beneficiary's starting date was July 4 rather than April 7, 2015, she gained more than 12 months of qualifying experience by the end of her employment on September 30, 2016. While the starting date of the Beneficiary's employment with [redacted] whether April 7 or July 4, 2015, would indeed be immaterial if the record established that the Beneficiary was actually employed by that business as an administrative assistant through September 30, 2016, we agree with the Director that the evidence submitted by the Petitioner, which has not been supplemented on appeal, does not establish that the Beneficiary was so employed. The letter submitted by the former owner of [redacted] who claims to have employed the Beneficiary is not supported by any primary evidence such as pay statements, tax records, or other official documentation, despite the Director's request for such evidence in the NOID. Moreover, the photocopied checks subsequently submitted by the Beneficiary as evidence that she was paid by [redacted] bear signatures that do not match the owner's. The Petitioner has not identified the signatory of the checks and explained why it was not the owner. Furthermore, while the first two checks have handwritten notations in the memo line referring to "July's payment" and "commission + salary,"[3] there are no such notations on the other three checks to indicate their purpose. Even if we were to accept these checks as credible evidence that the Beneficiary worked in some form for [redacted] in 2015, the total payment of $6,500 for five months of work was so far below the proffered wage rate[4] that the question arises, as the Director pointed out in his decision, of whether the Beneficiary was employed full-time. If the Beneficiary was not employed full-time her qualifying experience would be measured at some fraction of the 15 months of experience claimed with [redacted].[5] Finally, while the former and current owners of [redacted] assert that the company's bank accounts prior to the ownership transfer in November 2019 were closed, they have not explained why old statements from 2015 and 2016 could not have been obtained from the bank(s) to verify that additional monthly payments were made to the Beneficiary in 2016.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. See Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. See id.

[3] We note that receipt of a "commission" would be unusual for an administrative assistant, which casts further doubt on the veracity of the claimed employment.

[4] Since the proffered wage of the administrative assistant position is $33,654 per year, five months of pay at the proffered wage rate would amount to $14,025.

[5] While we have found that part-time employment can count toward fulfilling labor certification experience requirements, we will only count part-time employment as a proportionate fraction of full-time employment. See, for example, the non-precedent decisions in Matter of G-D- Corp., ID# 835847 (AAO May 3, 2018), and Matter of T-R-S-, ID# 1108577 (AAO Aug. 1, 2018), which draw on case law from the Board of Alien Labor Certification Appeals (BALCA). Though BALCA decisions are not binding on the AAO, they are instructive on certain issues and may provide guidance in our adjudication of particular cases.

For all of the reasons discussed above, we conclude that the evidence of record does not establish that the Beneficiary was employed by [redacted] as a full-time administrative assistant for at least 12 months, as required to meet the experience requirement of the labor certification.

On appeal the Petitioner asserts that the Beneficiary was also employed as an administrative assistant for more than four years in Brazil, submits some supporting documentation, and claims that this employment meets the experience requirement of the labor certification even if we discount the employment with [redacted]. The Petitioner contends that this evidence was not previously submitted to USCIS because it was thought the evidence of the Beneficiary's experience with [redacted] would suffice. The new evidence includes a letter from the human resources manager of [redacted] in [redacted], Brazil, dated March 19, 2020, stating that the Beneficiary was employed in the financial department as a full-time administrative assistant from June 2, 2008, to November 29, 2012. Also submitted on appeal are a copy of the Beneficiary's Brazilian work permit and social security booklet and a copy of page 12 of a Brazilian contract of employment identifying [redacted] as the employer, the position as an administrative assistant, and the dates of employment as June 2, 2008 to November 29, 2012, but does not identify the employee. In addition, three identically worded letters are submitted from individuals in Brazil who claim to have been co-workers of the Beneficiary at [redacted]

The AAO need not accept evidence offered for the first time on appeal when the petitioner has had the opportunity to submit such evidence earlier in the proceeding. See Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). Though the Petitioner bases its failure to disclose the job with [redacted] earlier in this proceeding on the belief that it was unnecessary in view of the Beneficiary's more recent job with [redacted], we note that section K of the labor certification specifically instructed the Petitioner to "list any other experience that qualifies the alien for the job opportunity [of administrative assistant]." The failure to list the Beneficiary's alleged job with [redacted] in the labor certification[6] lessens the credibility of the asserted work experience. See Matter of Leung, 16 I&N Dec. 2530 (BIA 1976).

Even if we granted the Petitioner's request to consider the new job claim and supporting evidence, which we do not, it is insufficient to establish that the Beneficiary gained any qualifying experience with [redacted] While the letter from [redacted] superficially comports with the regulatory requirement at 8 C.F.R. § 204.5(g)(1) which states that "[e]vidence relating to qualifying experience . . . shall be in the form of letters from current or former employer(s) . . . and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien," the letter's description of the Beneficiary's job duties at [redacted] hues so closely to the language used in the labor certification and the letter from [redacted] that it raises questions as to the authenticity of the employment verification. The only primary evidence of the alleged employment with [redacted] is one page of an employment contract which makes no mention of the Beneficiary as the employee. The three letters from alleged co-workers of the Beneficiary's at [redacted] have little probative value since they are identically worded, thus indicating that they were not individually prepared, and they do not comport with the requirement of 8 C.F.R. § 204.5(g)(1) that employment verification letters be written by the Beneficiary's employer, not her co-workers.

[6] The Petitioner also had the opportunity to submit evidence of the Beneficiary's alleged experience with [redacted] in response to the NOID, but did not.

For the reasons discussed above, we conclude that the Petitioner has not established that the Beneficiary was employed by [redacted] as a full-time administrative assistant for at least 12 months, as required to meet the experience requirement of the labor certification.

III. CONCLUSION

The Petitioner has not established that the Beneficiary had at least 12 months of qualifying experience as an administrative assistant by the priority date, as required by the labor certification. Therefore, the Beneficiary does not meet the experience requirement of the labor certification and does not qualify for "other worker" classification. The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision.

ORDER: The appeal is dismissed.