U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF P-E-P-

DATE: SEPT. 16, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as a Greek cook. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. 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" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a positon that requires at least two years of training or experience.

The petition was initially approved. The Director of the Nebraska Service Center subsequently revoked the approval, finding that the Petitioner had not adequately explained evidentiary inconsistencies concerning the Beneficiary's employment history and had not established that the Beneficiary met the minimum experience requirement of the labor certification.

On appeal, the Petitioner asserts that the documentation it previously submitted reconciled the evidentiary discrepancies identified by the Director and established by a preponderance of the evidence that the Beneficiary met the experience requirement the labor certification.

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 (ETA Form 9089, Application for Permanent Employment Certification) from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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 U.S. 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.

Section 205 of the Act 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c).

## II. ANALYSIS

### A. Minimum Requirements of the Labor Certification

A petition requesting skilled worker classification "must be accompanied by evidence that the [beneficiary] meets the educational, training or experience, and any other requirements of the individual labor certification." 8 C.F.R. § 204.5(l)(3)(ii)(B). The labor certification requirements must be met as of the petition's priority date,[1] which in this case is March 6, 2015. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The instant petition, filed in March 2016, was accompanied by a labor certification that required two years of experience in the job offered to qualify for the proffered position of Greek cook. The labor certification listed one prior job for the Beneficiary, stating that he was employed as a cook by the "Hotel [redacted]" in [redacted] Greece, from May 10, 2008, to December 10, 2012. As evidence of this employment a letter was submitted with the petition on the letterhead of Hotel [redacted] in [redacted] Greece, dated November 24, 2014, and bearing the signature of [redacted] Nikolaos, General Manager, which stated that the Beneficiary was employed as a cook specializing in Greek cuisine from May 10, 2008, to December 10, 2012.

The petition was initially approved in August 2016, but the Director issued a notice of intent to revoke (NOIR) in November 2018. The Director cited a statement by the Beneficiary on his nonimmigrant visa (NIV) application in April 2013 that his present work was on a "family owned landscaping and nursery farm for plants, flowers, and trees supplies." Drawing further from the NIV application, the Director cited the Beneficiary's answer of "No" to the question of "Were you previously employed?" The Director stated that these answers on the NIV application contradicted the work history alleged on the labor certification accompanying the instant petition.

After receiving the Petitioner's response to the NOIR, the Director issued a decision revoking the approval of the petition. In his decision the Director discussed three pieces of evidence submitted in response to the NOIR. They included: (1) a statement from the Beneficiary claiming that he was confused by the questions during his interview (at the U.S. Embassy) in Athens in connection with his NIV application in April 2013, and that he was working on the family farm at that time; (2) a second letter from [redacted] Nikolaos, general manager of Hotel [redacted] stating that the

[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).

Beneficiary was employed as a Greek cook from May 2008 to December 2012; and (3) a second letter from the Petitioner reiterating its desire to hire the Beneficiary as a Greek cook. The Director found this evidence insufficient to overcome the inconsistencies in the record, pointing out that no corroborating documentation of the Beneficiary's alleged employment was submitted, such as tax records or pay stubs.

On appeal the Petitioner claims that the Beneficiary reconciled the discrepancy between the NIV application and the instant immigrant visa petition in his statement responding to the NOIR that he did not understand the employment history question during his interview at the U.S. Embassy due to his poor command of English and an anxiety disorder. The Petitioner asserts that there is no evidence in the record that the Beneficiary was working anywhere other than the Hotel during the time period from May 2008 to December 2012. The Petitioner also asserts that the inconsistent statements concerning the Beneficiary's employment in Greece would not be resolved by the submission of additional documents such as tax returns and pay stubs. We do not agree.

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.* Contrary to the Petitioner's assertion on appeal, *Matter of Ho* is directly applicable to this case.

Considering the contradiction between the Beneficiary's claim in this proceeding to have worked as a cook at the Hotel during the years 2008-2012 and the omission of any reference to that employment in his prior NIV application and interview, it is incumbent upon the Petitioner to submit objective evidence of the Beneficiary's employment by the hotel. In his revocation decision the Director suggested the types of evidence that would be appropriate such as tax records or pay stubs. Yet the Petitioner has still not submitted any such evidence, or any other contemporary documents or official records, of the Beneficiary's alleged employment by the Hotel. Thus, the evidentiary deficiencies discussed by the Director have not been remedied on appeal.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). To meet this burden, the petitioner must prove by a preponderance of evidence that it and the beneficiary are qualified for that benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The "preponderance of the evidence" standard requires that the evidence demonstrate that the petitioner's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Id.* (quoting *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

For the reasons discussed above, we conclude that the evidence submitted by the Petitioner has not established that the Beneficiary gained any experience as a Greek cook with the [redacted] Hotel. Therefore, the record does not establish that the Beneficiary has two years of qualifying experience as required by the labor certification.

B. Eligibility for Classification as a Skilled Worker

The minimum requirements for skilled worker classification "are at least two years of training or experience." 8 C.F.R. § 204.5(l)(3)(ii)(B). As discussed in this decision, the evidence of record does not establish that the Beneficiary has at least two years of experience as a Greek cook, as required to qualify for the proffered position. Therefore, the Beneficiary is not eligible for classification as a skilled worker. For this reason as well the petition cannot be approved.

## III. CONCLUSION

The Petitioner has not established that the Beneficiary had at least two years of qualifying employment by the priority date of March 6, 2015, as required to meet the experience requirement of the labor certification and to qualify for classification as a skilled worker. The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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 P-E-P-*, ID# 5511281 (AAO Sept. 16, 2019)