U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16227834

Date: SEP. 16, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a bakery, sought to employ the Beneficiary as a procurement clerk. The company requested her classification under the third-preference, immigrant visa category for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

After first approving the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner didn't demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position.

As an appellant in revocation proceedings, the Beneficiary bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof).[1] Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved labor certification with an immigrant visa petition to USCIS. *See* section 204 of the Act. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

[1] U.S. Citizenship and Immigration Services (USCIS) treats beneficiaries in revocation proceedings as affected parties if they: 1) qualify for "portability" under section 204(j) of the Act, 8 U.S.C. § 1154(j); and 2) properly requested to port. *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). Consistent with *V-S-G-*, the Director found the Beneficiary eligible for treatment as an affected party. We may therefore consider her appeal.

Finally, if USCIS approves a petition, a designated noncitizen 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.

"[A]t any time" before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS may issue a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). USCIS properly revokes a petition's approval if a NOIR response doesn't rebut or resolve the stated revocation grounds. *Id.* at 451-52.

II. THE REQUIRED EXPERIENCE

A beneficiary must meet all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is May 30, 2014, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In assessing a beneficiary's qualifications for an offered position, USCIS must examine the job-offer portion of an accompanying labor certification to determine the position's minimum job requirements. USCIS may neither ignore a certification term nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states the minimum requirements of the offered position of procurement clerk as two years of experience in the job offered. The position requires neither training nor education. The Petitioner stated that it won't accept experience in an alternate occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date, she gained more than two years of full-time, qualifying experience. She stated that a bakery in South Korea employed her as a procurement clerk from March 2003 to June 2005.

To support claimed experience, a party must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must include the employer's name, title, and address, and a description of the beneficiary's experience. *Id.* If such a letter is unavailable, USCIS will consider other documentation of a beneficiary's experience. 8 C.F.R. § 204.5(g)(1).

At the time of the petition's filing in November 2015, the Petitioner submitted a "work certificate" from the South Korean bakery listed on the labor certification. Consistent with the Beneficiary's attestation, the certificate states the bakery's employment of her as a procurement clerk from March 2003 to June 2005.

The Director's NOIR, however, alleges inconsistencies in the Beneficiary's claimed, qualifying experience. The NOIR states that, at an interview regarding the Beneficiary's application for adjustment of status in 2017, she told a USCIS officer that a school in South Korea employed her from January 2005 to November 2006. She also reportedly told the officer that she began working for the bakery in January 2003, not in March 2003 as she attested on the labor certification. The NOIR requests additional evidence of her claimed, qualifying experience, which "may include, but is not limited to" payroll records, tax records, or affidavits from former employers.

The inconsistent start dates of employment at the South Korean bakery cast doubt on the Beneficiary's claimed, qualifying experience at the business. A party must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591. Also, the Beneficiary's stated work at the school would have overlapped a portion of her claimed tenure at the bakery, from January 2005 to June 2005. The purported, concurrent work casts doubt on her bakery experience, especially on its claimed, full-time nature. Thus, the NOIR's allegations would have warranted the petition's denial for insufficient evidence of qualifying experience. The Director therefore issued the NOIR for good and sufficient cause.

In an affidavit in her NOIR response, the Beneficiary stated that she lacks tax records from her tenure at the bakery but worked there full-time from March 2003 to June 2005.[2] She also attested that, during her full-time employment at the bakery from January 2005 to June 2005, she worked four hours a day at the school.

The Beneficiary's NOIR response doesn't resolve the inconsistencies in her claimed, qualifying experience. The Beneficiary didn't explain why she provided different start dates of employment at the South Korean bakery. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a party to resolve inconsistencies of record). The record also lacks evidence corroborating her claimed, part-time employment at the school from January 2005 to June 2005.

On appeal, the Beneficiary asserts that USCIS' request for independent, documentary evidence of her prior employment is "excessive and unreasonable," as she worked for the South Korean bakery and school about 15 years ago. She argues that statutes of limitations on most federal crimes and document retention periods for U.S. financial institutions don't exceed five years.

We acknowledge the potential difficulty in obtaining documentary evidence of distant employment. As previously indicated, however, USCIS may revoke a petition's approval "at any time" before a beneficiary obtains lawful permanent residence. Section 205 of the Act. Also, the doubts on the Beneficiary's claimed experience stem from her own inconsistent statements. Thus, she must "resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. at 591.

Also as previously indicated, USCIS will consider other documentation in lieu of unavailable, requested evidence. 8 C.F.R. § 204.5(g)(1). The Beneficiary, however, hasn't established the unavailability of additional, documentary evidence of her claimed experience. She stated that she

[2] Pursuant to 8 C.F.R. § 205.2(a), (b) and *Matter of V-S-G-*, *supra*, the Director also sent a NOIR to the Petitioner. USCIS, however, didn't receive a response from the business.

doesn't have tax records from her tenure at the South Korean bakery. But she hasn't demonstrated the records' unavailability or explained whether she tried to obtain those or other documents.

Case law requires the Beneficiary to resolve the inconsistencies of record with objective evidence, and Department of Homeland Security regulations allow her flexibility in the types of evidence she may submit. Thus, USCIS' request for independent, documentary evidence of the Beneficiary's claimed, qualifying experience was neither excessive nor unreasonable.

The Beneficiary also asserts that she should have received notice of "the obligation to retain copies of pay records from 15 years ago." Contrary to the Beneficiary's assertion, however, she didn't need to retain copies of bygone pay records. As previously indicated, to demonstrate qualifying experience, beneficiaries of skilled-worker petitions generally need only provide letters from former employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The need for additional, corroborating evidence stems from the Beneficiary's own, inconsistent statements. *See Matter of Ho*, 19 I&N Dec. at 591. Also, as previously discussed, resolution of the discrepancies doesn't necessarily require submission of pay records. *See* 8 C.F.R. § 204.5(g)(1).

In addition, pursuant to case law and regulations, the NOIR sufficiently notified the Beneficiary of the need for additional evidence of her qualifying experience. *See* 8 C.F.R. § 205.2(a), (b); *see also Matter of V-S-G- Inc.*, *supra*. USCIS needn't provide her with additional notice. *See Contreras v. Att'y Gen. of the United States*, 665 F.3d 578, 585-86 (3d Cir. 2012) (holding that due process rights under the Fifth Amendment do not extend to Form I-140 beneficiaries in petition proceedings).

For the foregoing reasons, the Beneficiary hasn't demonstrated her claimed, qualifying experience for the offered position. We will therefore affirm the revocation of the petition's approval.

Although unaddressed by the NOIR, the record contains additional inconsistencies in the Beneficiary's claimed, qualifying experience. On a November 2006 application for a U.S. nonimmigrant student visa, the Beneficiary attested that she began working at the school in June 2004, not in January 2005 as she told the USCIS officer at her adjustment interview. Her additional period of employment at the school would further overlap her claimed, qualifying experience at the South Korean bakery. In addition, asked on the visa application if she had work experience beyond her tenure at the school, the Beneficiary omitted her purported employment by the bakery, indicating "None" in the two spaces provided for additional, prior employers. These additional discrepancies cast further doubt on the Beneficiary's claimed, qualifying experience. *See Matter of Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of remaining evidence of record).

The Director didn't notify the Petitioner or Beneficiary of these additional discrepancies. Thus, in any future filings in this matter, the Petitioner or Beneficiary must also submit additional evidence resolving these inconsistencies and demonstrating her claimed, qualifying experience for the offered position.

III. ABILITY TO PAY THE PROFFERED WAGE

Also unaddressed by the Director, the record at the time of the NOIR's issuance didn't establish the Petitioner's ability to pay the proffered wage of the offered position.

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In assessing ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date onward. If a petitioner didn't annually pay the full proffered wage or didn't pay a beneficiary at all, USCIS examines whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[3]

The accompanying labor certification states the proffered wage of the offered position of procurement clerk as $39,333 a year. As previously indicated, the petition's priority date is May 30, 2014.

USCIS approved the petition in November 2015. Thus, at the time of approval, the Petitioner had to demonstrate its ability to pay the proffered wage in 2014 and 2015.

The Petitioner didn't claim to have employed the Beneficiary and didn't submit any evidence that it paid her in 2014 or 2015. Thus, based solely on wages paid, the business didn't establish its ability to pay the proffered wage.

The Petitioner submitted a copy of its federal income tax return for 2014. The tax return reflects amounts of both net income and net current assets exceeding the annual proffered wage of $39,333. Thus, the Petitioner appeared to demonstrate its ability to pay the proffered wage in 2014. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacked required evidence of the Petitioner's continuing ability to pay in 2015. The record therefore didn't establish the business's continuing ability to pay the proffered wage.

Moreover, USCIS records indicate the Petitioner's filing of a Form I-140 petition for another beneficiary. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). This Petitioner therefore had to demonstrate its ability to pay the combined proffered wages of this petition and any others the business filed that were pending or approved as of this petition's priority date or filed thereafter but before the petition's approval. *See Patel v. Johnson*, 2 Fed.Supp.3d 108, 124 (D. Mass.

[3] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rahman v. Chertoff*, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009).

2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner didn't demonstrate its ability to pay the combined proffered wages of multiple petitions).[4]

USCIS records indicate both the Petitioner's filing and the Agency's approval of the business's other Form I-140 petition in February 2015. Also, USCIS records identify the other petition's priority date as May 30, 2014, the same as this petition's priority date. Thus, the Petitioner had to demonstrate its ability to pay the combined proffered wages of this and its other petition in 2014 and 2015.

The record, however, didn't include the proffered wage of the Petitioner's other petition. USCIS therefore couldn't calculate the total, combined proffered wages that the business had to demonstrate its ability to pay in 2014 and 2015. For this additional reason, the Petitioner didn't demonstrate its ability to pay the proffered wage.

The NOIRs didn't notify the Petitioner or Beneficiary of this additional, potential ground of revocation. Thus, in any future filings in this matter, the Petitioner or Beneficiary must provide the proffered wage of the Petitioner's other Form I-140 petition and submit copies of the business's annual report, federal tax return, or audited financial statements for 2015. The Petitioner or Beneficiary may also submit additional evidence of the Petitioner's ability to pay, including proof of any payments the business made to applicable beneficiaries in relevant years or materials supporting the factors stated in *Sonegawa*. *See* 12 I&N Dec. at 614-15.

IV. CONCLUSION

The Beneficiary hasn't demonstrated her possession of the minimum experience required for the offered position. We will therefore affirm the revocation of the petition's approval.

ORDER: The appeal is dismissed.

[4] The Petitioner needn't demonstrate its ability to pay proffered wages of petitions that it withdrew or, unless pending on appeal or motion, that USCIS rejected, denied, or revoked. The Petitioner also needn't demonstrate its ability to pay proffered wages before the corresponding priority dates of their petitions or after the dates corresponding beneficiaries obtain lawful permanent residence.