U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-B-C-O-A-

DATE: SEPT. 27, 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 an administrative assistant. It requests her classification under the third-preference, immigrant category as an "other worker." *See* 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" category allows a U.S. organization to sponsor a foreign national for lawful permanent resident status to work in a job requiring less than two years of training or experience.

After the filing's initial grant, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position.

On appeal, the Petitioner submits additional evidence. The church argues that USCIS should have provided it with a copy of derogatory evidence and that it has resolved inconsistencies of record regarding the Beneficiary's qualifying experience.

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

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an other worker generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain 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). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and the requested visa classification. If USCIS grants a petition, a foreign national may finally 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. The erroneous nature of a petition's approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

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

II. REQUIRED EXPERIENCE

A petitioner must establish a beneficiary's possession of 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).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum 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).

Here, the labor certification states the minimum requirements of the offered position of administrative assistant as a U.S. high school diploma or an equivalent foreign credential, and one year of experience in the offered position. Also, part H.14 of the labor certification, "Specific skills or other requirements," states that the position requires "computer proficiency."

On the labor certification, the Beneficiary attested that, by the petition's priority date, she gained more than four years of full-time, qualifying experience. She stated that she worked for a church in South Korea as an administrative assistant from March 2005 to May 2009.

To establish qualifying experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). A letter must contain an employer's name, address, and title, and describe a beneficiary's experience. *Id.*

The Petitioner submitted a written "employment verification" signed by the senior pastor of the South Korean church. The English translation of the verification stated that the church employed the Beneficiary as an administrative assistant from March *2006* to May 2009. But the original verification in Korean includes Arabic numerals and, consistent with the information on the labor certification, indicates that the Beneficiary assumed the position in March *2005*.

The Director's NOIR, however, noted that, on a 2012 application for a U.S. nonimmigrant student visa, the Beneficiary certified that she had never been employed. The NOIR also asserted that the employment verification of the South Korean church had little evidentiary value because its English

[1] This petition's priority date is April 4, 2016, 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).

translation lacked a certification. *See* 8 C.F.R. § 103.2(b)(3) (requiring petitioners to provide not only full English translations of documents containing foreign languages, but also certifications from the translators that they are linguistically competent and that their translations are complete and accurate).

Contrary to the NOIR, the record contained a certification for the translation of the employment verification. Nevertheless, the Beneficiary's denial of employment experience on her student visa application casted significant doubt on her claimed, qualifying experience. A petitioner must resolve such inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591. Thus, the unexplained and unrebutted record did not establish the Beneficiary's qualifying experience and would have warranted the petition's denial. The Director therefore properly issued the NOIR.

The Petitioner's NOIR response included an affidavit of the Beneficiary. She stated that, when completing the student visa application, she did not consider her work for the South Korean church to constitute "employment." She said the church did not pay her wages, but only reimbursed her in cash for transportation and other expenses. The Beneficiary stated:

> I was not working for money. I was doing my job to serve God and his church I was destined to serve. For this simple reason, when I applied for [the student] Visa, I did not indicate that I had previous employment history. I had no intention to lie to the U.S. government to obtain a visa.

Unpaid work can constitute qualifying experience. *Matter of B&B Residential Facility*, 01-INA-146 *4 (BALCA July 16, 2002).[2] But the Beneficiary's affidavit contained another inconsistency. Without indicating her work for the South Korean church as an administrative assistant, the affidavit stated that she had "served the church as bible teacher since college." As the Beneficiary states in her affidavit on appeal, a reader of her prior statement "would only naturally reach the conclusion that I did not work for the Church in the position of Church Administrative Assistant because the entire part of my work experience in the position . . . is missing." The Beneficiary maintains that she worked as an administrative assistant for the South Korean church from 2005 to 2009. She states that she omitted this experience from her student visa application "because I did not believe having received compensation in cash and not having it reported on my tax report would be considered 'working.'"

The Beneficiary's explanation of the omission of her claimed qualifying experience from the student visa application is consistent with her prior affidavit and seems reasonable. But the record does not

[2] Decisions of the Board of Alien Labor Certification Appeals (BALCA), a part of DOL, do not bind us. *See* 8 C.F.R. §§ 103.10(b), (e) (stating that all Department of Homeland Security employees must follow precedent decisions of the Board of Immigration Appeals (BIA) and the Attorney General in proceedings involving the same or similar issues). As previously indicated, however, Congress directed DOL to determine the availability of qualified U.S. workers for positions offered to qualifying immigrants. *See* section 212(a)(5)(A)(i)(I) of the Act. We therefore defer to DOL's reasonable determinations regarding position qualifications. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157-59 (1991) (requiring one agency to defer to a reasonable regulatory interpretation of another charged with promulgating and enforcing a statute).

similarly support the omission of her claimed qualifying experience from her prior affidavit. The Petitioner and the Beneficiary assert that prior counsel prepared the Beneficiary's earlier statement in English, without translating it into Korean for the Beneficiary. Thus, they contend that prior counsel deprived the Beneficiary of knowledge of the affidavit's omission of her qualifying experience. This explanation effectively accuses the prior attorney of ineffective assistance of counsel. The Petitioner, however, has not complied with requirements designed to ensure our possession of information needed to evaluate an ineffective assistance claim and to deter a meritless allegation. A petitioner asserting ineffective assistance of counsel must generally provide: a written affidavit describing the representation agreement with prior counsel; evidence that counsel was informed of the ineffective assistance allegation; and proof of the filing of a complaint with appropriate disciplinary authorities, or an explanation of the absence of a complaint. *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Here, the record lacks information regarding the representation agreement with prior counsel and assuring the validity of the ineffective assistance claim. The record therefore does not support ineffective assistance of counsel as an explanation for the omission of the Beneficiary's claimed qualifying experience from her earlier affidavit. *See Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000) (holding that agencies may generally deny claims of ineffective assistance of counsel if they do not meet the *Lozada* requirements).

The Petitioner also provides additional affidavits from pastors of the South Korean church, attesting to the Beneficiary's qualifying experience as an administrative assistant. One of the senior pastor's affidavits, however, casts doubt on the Beneficiary's experience by stating, contrary to the information on the labor certification, that she worked "[f]rom year *2006* until 2009." (emphasis added). Moreover, the record lacks sufficient, independent, objective evidence of the Beneficiary's claimed experience. If the church paid the Beneficiary in cash, payroll and tax records of her work would not exist. But the record does not explain the absence of contemporaneous, internal church records of the Beneficiary's work. The senior pastor stated that the church has about 1,000 congregants and six administrative volunteers. The Beneficiary stated that the church paid her the equivalent of about $450 a month, and the senior pastor stated that some volunteers received more. Considering the size of the church and the scope of its operations, the record does not explain the absence of contemporaneous, church records indicating its allocation or budgeting of funds to pay the Beneficiary and its other volunteers. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies with independent, objective evidence).

On appeal, the Petitioner and the Beneficiary assert that USCIS should have provided them with a copy of her 2012 visa application. *See* 8 C.F.R. § 103.2(b)(16) (stating that a petitioner "shall be permitted to inspect the record of proceeding which constitutes the basis for the decision"). However, the regulations at 8 C.F.R. § 103.2(b)(16) do not require USCIS to provide copies of derogatory documents to petitioners or applicants. Rather, the Agency may simply send written notices summarizing such evidence. *See, e.g., Sehgal v. Lynch*, 813 F.3d 1025, 1031-32 (7th Cir. 2016) (stating that "a summary [of derogatory evidence] can suffice") (citation omitted). Here, the Director's NOIR sufficiently summarized the derogatory information in the Beneficiary's student visa application.

Citing a federal court decision, the Petitioner also argues that the absence of tax records should not undermine the Beneficiary's qualifying experience. *See Betancur v. Roark*, No. 10-11131-RWZ, 2012 WL 4862774 **6-8 (D. Mass. Oct. 15, 2012) (holding that, despite a lack of tax and payroll documentation, the record supported a beneficiary's claimed, qualifying experience). As previously indicated, however, we acknowledge that tax records would not exist if the Beneficiary received only cash reimbursements from the church. Pursuant to *Ho*, however, the Petitioner must provide copies of any contemporaneous, church documents evidencing the Beneficiary's claimed work, or explain their absence.

Finally, the Petitioner attempts to factually distinguish this matter from *Ho*. There, immigration officials revoked a naturalized citizen's immigrant petition for his adopted, unmarried son. *Id.* at 582-83. The officials found that the petitioner did not establish his son's residency with him or his spouse for the required two-year period. *Id.* at 584; *see also* 8 C.F.R. § 204.2(d)(2)(vii) (requiring evidence that an adopted son or daughter lived with the adopting parent or parents for at least two years). On appeal, the BIA affirmed the decision, finding affidavits from the petitioner and his family insufficient to establish the requisite residency period. The Petitioner argues that the affidavits in *Ho* were mostly from members of the petitioner's immediate family who would have benefited from the petition's approval. The Petitioner contends that, unlike in *Ho*, it has submitted affidavits supporting the Beneficiary's qualifying experience from pastors who are "disinterested third parties."

The decision in *Ho*, however, did not turn on the biases of the affiants. Rather, the BIA found the affidavits from the petitioner and his family "unsubstantiated" and "contradicted by the affiants' own prior declarations." *Id.* at 591. Here, as in *Ho*, the affidavits of the pastors are unsubstantiated. The record lacks contemporaneous, church records supporting the church's claimed payments to the Beneficiary or an explanation of the absence of records. A prior declaration of the senior pastor also contradicts his most recent statement that the Beneficiary began working as an administrative assistant in 2005. Even if we considered bias, the record does not establish the pastors as "disinterested." The record indicates that the Beneficiary's membership in the church spanned 25 years, and at least three of the six pastors who provided affidavits indicated that they knew her for that entire period. Given the long standing personal relationships, the record does not demonstrate that the pastors are unbiased towards the Beneficiary. The Petitioner's argument is therefore unavailing.

For the foregoing reasons, the Petitioner did not demonstrate the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the revocation of the petition's approval.

IV. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the revocation of the petition's approval. A petitioner in revocation proceedings bears the burden of establishing eligibility for the requested benefit. *Matter of Ho*, 19 I&N Dec. at 589. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of K-B-C-O-A-*, ID# 5781339 (AAO Sept. 27, 2019)