U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9298218

Date: JUN. 3, 2022

Certification of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a provider of software development and consulting services, sought to employ the Beneficiary as a software engineer. The company requested his classification under the second-preference, immigrant visa category for members of the professions holding advanced degrees. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner did not demonstrate its required ability to pay the combined proffered wages of this and other Form I-140 petitions. The Director also found insufficient evidence of the *bona fides* of the Petitioner's job offer and of the Beneficiary's possession of the minimum employment experience required for the offered position and the requested immigrant visa classification.

The Director certified her decision to us for consideration. *See* 8 C.F.R. § 103.4(a)(5) (authorizing our review of cases on certification after issuances of initial decisions). Upon review, we will revoke the petition's approval.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional 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 the offered position; and (2) employment of a noncitizen in the position would not 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 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 noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a beneficiary 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 the record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citation omitted).

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 notice's issuance would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a NOIR response does not rebut or resolve revocation grounds stated in the notice, USCIS properly revokes a petition's approval. *Id.* at 451-52.

II. CASE HISTORY

The Petitioner began temporarily employing the Beneficiary as a software engineer in nonimmigrant work visa status in 2004. In October 2006, the company filed a labor certification application seeking permission to permanently employ him in the position. After DOL certified the application, the company filed this Form I-140 petition for the Beneficiary with USCIS in November 2006. While the petition was pending in August 2007, the Beneficiary applied for adjustment of status. USCIS approved the Form I-140 petition in February 2008. The Beneficiary's adjustment application remained pending.

In December 2011, the Beneficiary left the Petitioner's employ and began working for another U.S. company. The following month, he notified USCIS of his change of employer. Under the Act's "portability" provision, he asked USCIS to grant him lawful permanent residence based on his new employment, without the new employer's need to file its own labor certification application or Form I-140 petition for him. *See* section 204(j) of the Act. The portability provision preserves the validity of Form I-140 petitions for adjustment applicants whose applications have remained unadjudicated for at least 180 days if the applicants change employers and their new jobs are in the same or similar occupational classifications as listed in their corresponding petitions. *Id.*

In April 2012, the Director sought to revoke the petition's approval. She found insufficient evidence of the Petitioner's ability to pay the position's proffered wage. The NOIR alleged the company's need to demonstrate its ability to pay combined proffered wages of this and its other Form I-140 petitions that were pending or approved. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). The notice also alleges that the Petitioner supported its claimed ability to pay with false payroll tax records.

Although the Petitioner no longer employed the Beneficiary, it timely responded to the NOIR. The company submitted additional, financial documentation and a list of other Form I-140 petitions it had filed. The company also requested copies of its payroll tax records that a state agency had provided to USCIS and additional details about alleged discrepancies in the company's records.

In December 2013, the Director revoked the petition's approval, finding insufficient evidence of the Petitioner's ability to pay combined proffered wages of its applicable petitions. We affirmed the revocation in February 2015 but reopened and remanded the matter after receiving motions to reopen and reconsider from the Beneficiary. *See Matter of T-S-, Inc.*, ID# 78793 (AAO Jan. 22, 2018).

USCIS must treat beneficiaries who qualify for portability under section 204(j) of the Act and properly requested to "port" as "affected parties" in revocation proceedings. *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). We therefore instructed the Director on remand to consider the Beneficiary's eligibility to participate in the revocation proceedings.

On remand, the Director found the Beneficiary eligible for treatment as an affected party and issued a second NOIR to him and the Petitioner. Like the first NOIR, the second notice alleges insufficient evidence of the Petitioner's ability to pay the combined proffered wages of multiple Form I-140 petitions. The second NOIR also alleges insufficient evidence of the *bona fides* of the Petitioner's job offer and of the Beneficiary's qualifying experience for the offered position and the requested immigrant visa classification.

After reviewing the Beneficiary's NOIR response in November 2019,[1] the Director revoked the petition's approval on the grounds stated in the second NOIR and certified her decision to us for review. As the sole, responding party in revocation proceedings, the Beneficiary bears the burden of establishing eligibility for the petition by a preponderance of evidence.[2] *See Matter of Ho*, 19 I&N Dec. at 589 (citation omitted) (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof).

III. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner did not establish its employment of at least 100 people. Its evidence of ability to pay therefore must have included copies of annual reports, federal tax returns, or audited financial statements. *Id.*

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

The accompanying labor certification states the proffered wage of the offered position of software engineer as $34.45 an hour, or - based on a 40-hour, work week - $71,656 a year. The petition's

[1] The Petitioner did not respond to the second NOIR, which the U.S. Postal Service returned to USCIS as "undeliverable." The Beneficiary states that the Petitioner no longer conducts business. Online California records show that state authorities suspended the Petitioner's corporate status in 2013. *See* Cal. Sec'y of State, "Business Search," https://businesssearch.sos.ca.gov/.

[2] Consistent with 8 C.F.R. § 103.4(a)(2), the Director's notice of certification informed the Beneficiary that, within 30 days of the notice's issuance, he could have submitted a written brief to us. As of this decision's date, we have not received any further submissions from the Beneficiary.

[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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

priority date is October 5, 2006, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

A petitioner must demonstrate its ability to pay a proffered wage from a petition's priority date onward. 8 C.F.R. § 204.5(g)(2). USCIS approved the Petitioner's petition in February 2008. Thus, at the time of the petition's approval, the company had to establish its ability to pay from 2006 to 2008.

The Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, for 2006, 2007, and 2008. The forms show that the company paid the Beneficiary $60,000 in both 2006 and 2007, and $64,330.98 in 2008. These annual amounts do not equal or exceed the annual proffered wage of $71,656. Thus, based solely on wages paid, the record does not demonstrate the Petitioner's ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments to the Beneficiary. The company need only demonstrate its ability to pay the annual differences between the proffered wage and wages paid - $11,656 in 2006 and 2007, and $7,325.02 in 2008.

The Petitioner submitted copies of its federal income tax returns for 2006, 2007, and 2008. For all corresponding years, the returns reflect annual amounts of net income and net current assets exceeding the differences between the proffered wage and wages paid. Thus, the returns appear to indicate the Petitioner's ability to pay the Beneficiary's individual proffered wage. But, as both NOIRs noted, USCIS records indicate the Petitioner's filing of Form I-140 petitions for other beneficiaries. 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 must demonstrate its ability to pay the combined proffered wages of this and its other petitions that were pending or approved as of this petition's priority date of October 5, 2006, or filed thereafter in 2006, 2007, or before the petition's approval on February 3, 2008. *See Patel v. Johnson*, 2 F.Supp.3d at 124.[4]

In response to the first NOIR, the Petitioner's list of its other Form I-140 petitions omitted the requested proffered wages of at least five petitions that were pending or approved as of the petition's 2006 priority date. The Petitioner asserted that it need not demonstrate its ability to pay the proffered wages of four of the five petitions because, under section 204(j) of the Act, their beneficiaries ported to other employers. The Petitioner, however, did not provide evidence of the claimed changes of employer. Regarding the remaining petition, the Petitioner claimed that it withdrew the filing. But the company also omitted evidence to corroborate the purported withdrawal, and USCIS records do not indicate the filing's retraction. Thus, the record at the time of the second NOIR's issuance did not establish the Petitioner's ability to pay the combined proffered wages of all its applicable beneficiaries. In responding to the second NOIR, the Beneficiary also omitted evidence of the proffered wages of the five other petitions, the four beneficiaries' purported changes of employers, and the claimed withdrawal of the fifth petition.

Further, as the second NOIR alleged, the record lacks reliable evidence of the Petitioner's ability to pay the proffered wage at the time of the petition's 2006 priority date. The Petitioner submitted a copy

[4] The Petitioner need not 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 need not demonstrate its ability to pay proffered wages of petitions before their corresponding priority dates or after their corresponding beneficiaries obtained lawful permanent resident status.

of a three-page payroll tax record for California stating the company's employment of 17 people in each month of the fourth quarter of 2008. Copies of records from California government officials for the same period, however, consist of only two pages listing 12 employees each month. Thus, the Petitioner appears to have provided USCIS with different payroll tax records than it submitted to California authorities. Additionally, as the second NOIR detailed, the Petitioner provided USCIS in other cases with payroll records for 2008 and 2009 that differ from records provided by California authorities for the same periods. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring resolution of inconsistencies of record with independent, objective evidence pointing to where the truth lies).

As previously indicated, these proceedings focus on the Petitioner's ability to pay the proffered wage from the petition's priority date in October 2006 until the filing's approval in February 2008. But the unresolved discrepancies in the Petitioner's payroll tax records from the fourth quarters of 2008 and 2009 cast doubt on the authenticity and accuracy not only of those documents, but also on the company's remaining financial evidence for 2006, 2007, and 2008, including its federal income tax returns and the Beneficiary's Forms W-2. *See Matter of Ho*, 19 I&N Dec. at 451 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the remaining evidence supporting the petition).

In response to the second NOIR, the Beneficiary stated that, "as an employee of the company, [he] did not have access to financial records of the petitioner" and continues to lack such access "now that the petitioner is no longer in operation." Under these circumstances, the Beneficiary asked USCIS to consider the Petitioner's ability to pay only his individual, proffered wage. The Beneficiary stated:

> [I]t is evident that [he] is an injured party to the petitioner's mishandling of its own financial and immigration records. The beneficiary, at no fault of his own, is placed in the situation where he must resolve discrepancies that are outside of his knowledge and control. We request the USCIS to consider the undue harm that will be inflicted upon the beneficiary if the USCIS revokes the instant petition based on the beneficiary's inability to resolve discrepancies and errors made by the petitioner alone.

When adjudicating a Form I-140 petition, however, USCIS must determine "whether the job offer is realistic and whether the wage offer can be met." *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977). Without the proffered wages of the Petitioner's petitions for other applicable beneficiaries, the Agency cannot determine whether the company could have realistically met all its wage obligations from the petition's priority date until the Beneficiary's adjustment application had remained pending 180 days. The Director therefore properly required evidence of the Petitioner's ability to pay the proffered wages of not only the Beneficiary, but also of all beneficiaries with applicable, pending or approved petitions.

Moreover, the portability provision at section 204(j) of the Act does not shield petitions from revocation. *Herrera v. USCIS*, 571 F.3d 881, 883 (9th Cir. 2009). "[I]n order for a petition to 'remain' valid [for portability purposes], it must have been valid from the start." *Id.* at 887. The record does not establish the Petitioner's ability to pay all applicable, proffered wages from the petition's priority date until the filing's approval. Thus, having never been valid, the petition cannot "remain valid" under section 204(j) of the Act.

The record lacks sufficient and reliable evidence of the Petitioner's ability to pay the combined proffered wages of its applicable petitions from this petition's priority date. We will therefore revoke the petition's approval.

IV. THE REQUIRED EMPLOYMENT EXPERIENCE

Advanced degree professionals must hold "advanced degrees or their equivalent." Section 203(b)(2)(A) of the Act. The term "advanced degree" means:

> any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

A petitioner must also demonstrate 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). 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 unlisted 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 primary requirements of the offered position of software engineer as a U.S. bachelor's degree or a foreign equivalent degree in "any field," and five years of experience "in the job offered." On a labor certification application, experience "in the job offered" means "experience performing the key duties of the job opportunity" as listed on the application. *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. at 4 (BIA Oct. 24, 2011) (citations omitted). The labor certification states that the Petitioner will not accept experience in an alternate occupation. The certification also states the Petitioner's acceptance of an alternate combination of education and experience: a master's degree and one year of experience.

The Petitioner does not claim the Beneficiary's possession of a U.S. master's degree or a foreign equivalent degree. Rather, the company seeks to qualify him for the offered position based only on the position's primary requirements of a bachelor's degree and five years of experience. On the labor certification, the Beneficiary attested to his receipt of a foreign equivalent of a U.S. bachelor's degree in 1995. He also stated that, by the petition's priority date, he gained more than five years of full-time, post-baccalaureate experience as a software engineer at software development companies in Asia. The Beneficiary stated the following experience:

- About three years and seven months in India, from April 1996 through August 1999;
- About seven months in Malaysia, from September 1999 to April 2000; and
- About two years and three months in Malaysia, from May 2001 to August 2003.

Consistent with 8 C.F.R. § 204.5(g)(1), the Petitioner submitted letters in support of the Beneficiary's claimed experience from the former employers listed on the labor certification.[5] The second NOIR, however, states that, in November 2014, USCIS officers in India could not verify the Beneficiary's claimed, prior employment in that country. The NOIR states that an officer went to the address listed on the former employer's letter but could not locate the business there. The NOIR also states that another USCIS officer in Malaysia could not confirm the Beneficiary's claimed, prior employment with the two, listed companies in that country.

As issued, the second NOIR's allegations regarding the Beneficiary's experience would not have warranted the petition's denial. *See Matter of Estime*, 19 I&N Dec. at 451 (discussing NOIR requirements). As the Beneficiary argued in his NOIR response, USCIS attempted to verify his employment in November 2014, more than 11 years after the end of his most recent, claimed tenure with a former employer. During that 11-year period, the Beneficiary's claimed former employer could have terminated their business, or changed their names, locations, or telephone numbers.

A USCIS officer reportedly visited the site of the Beneficiary's former Indian employer at the address listed on the labor certification. But the second NOIR does not indicate whether the officer tried to locate the employer by other means. The NOIR also does not state how the officer in Malaysia attempted to verify the Beneficiary's claimed employment in that country. Thus, considering the passage of time since the Beneficiary's claimed experience and the lack of details regarding USCIS' verification attempts, the NOIR does not support revocation of the petition's approval based on the Beneficiary's qualifying experience. *See Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988) (holding that a petition's revocation can only be grounded on the factual allegations stated in a NOIR). As currently constituted, the record therefore does not support revocation of the petition's approval on this ground.

Despite the second NOIR's deficiencies, however, the record does not establish the Beneficiary's qualifying experience for the offered position and the requested immigrant visa classification. Contrary to 8 C.F.R. § 204.5(g)(1), the letter from the Beneficiary's purported former employer in India lacks a description of the Beneficiary's experience. The Beneficiary's NOIR response included a 2019 letter from a purported, former co-worker of his in India. Like the former employer's letter, however, the letter from the purported, former co-worker does not describe the Beneficiary's experience. Additionally, the record lacks evidence corroborating the co-worker's claimed employment by the employer during the Beneficiary's, purported tenure. The record therefore does not establish the Beneficiary's claimed, qualifying experience in India.

Without sufficient proof of the Beneficiary's claimed experience in India from April 1996 to August 1999, the record does not demonstrate his possession of at least five years of experience "in the job

[5] The Petitioner also submitted a letter from another purported former employer of the Beneficiary in India. The second NOIR questions this claimed experience because the Beneficiary omitted it from the labor certification application, which required him to "list any other experience that qualifies the alien for the job opportunity." *See Matter of Leung*, 16 I&N Dec. 12, 14-15 (Distr. Dir. 1976), *disapp'd of on other grounds by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (rejecting a noncitizen's claim of qualifying experience as not credible where he omitted the experience from a labor certification on his behalf). Neither the Beneficiary's NOIR response nor his appeal asserts that his additional employment in India constitutes qualifying experience. We therefore will disregard the evidence of this employment. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009) (declining to address an issue that a party did not raise on appeal).

offered" as required for the offered position. The record also does not establish his possession of at least five years of post-baccalaureate experience as required for the requested immigrant visa classification. Thus, in any future filings in this matter, the Beneficiary must provide additional evidence of his claimed, qualifying experience in India.

V. THE *BONA FIDES* OF THE JOB OFFER

A business may file an immigrant petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis).

The Petitioner's Form I-140 and accompanying labor certification indicate the company's intention to employ the Beneficiary full-time as a software engineer at its headquarters in California. The second NOIR notes that copies of the Beneficiary's Forms W-2 from the Petitioner indicate that, from 2006 to 2011, he lived in Texas. The NOIR therefore alleges that the Petitioner did not establish its required intent to employ the Beneficiary in the offered position in California.

Beneficiaries, however, need not work in their offered positions for prospective employers until they obtain lawful permanent residence. *See, e.g., Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009) (stating that "[a]n alien is not required to have been employed by the certified employer prior to adjustment of status") (citations omitted). Also, the copies of the Petitioner's payroll tax records that California officials provided to USCIS indicate the company's regular employment of workers in the state. Thus, evidence of the Beneficiary's residence outside California from 2006 to 2011 does not establish that the Petitioner lacked intent to employ him, upon his receipt of lawful permanent residence, in the offered, California position.

The NOIR would not have warranted the petition's denial based on insufficient evidence of the Petitioner's intent to employ the Beneficiary in the offered position. The record therefore does not support the petition's revocation on that ground.

VI. CONCLUSION

The factual allegations of the second NOIR did not support revocation of the petition's approval. A preponderance of evidence established the Beneficiary's qualifying experience for the offered position and the requested immigrant visa category, as well as the Petitioner's intent to employ him in the position. In revocation proceedings, however, neither the Petitioner nor the Beneficiary demonstrated the company's required ability to pay the proffered wage as of the petition's priority date.

ORDER: The approval of the petition is revoked.