U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22972408

Date: DEC. 1, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a builder, developer, and construction business, seeks to employ the Beneficiary as a stone cutter. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. 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 position that requires at least two years of training or experience.

The petition was initially approved. However, the Director of the Nebraska Service Center subsequently revoked the approval on the ground that the Petitioner did not provide sufficient evidence of the Beneficiary's qualifying experience for the offered position.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter de novo. See Matter of Christo 's Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Immigration as a skilled worker usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL). Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. Id. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id. Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5.[1]

[1] These requirements must be satisfied by the priority date of the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2),

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

At 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, a petition's erroneous approval may justify its revocation. See Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988). 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

The Petitioner is a builder, developer, and construction business that was established in 2004 and has approximately six employees. The underlying labor certification states that the offered position requires no training or education and 24 months of experience as a stone cutter. Experience in an alternate occupation is not accepted. On the labor certification, the Petitioner asserts that the Beneficiary gained experience as a stone cutter-tile setter with [redacted] in [redacted], Poland from May 10, 2010, to August 30, 2013. The initial evidence submitted with the petition included a certification dated September 26, 2016, from [redacted] of [redacted] confirming the Beneficiary's work experience indicated on the labor certification.

Following the approval of the petition, the Director issued a notice of intent to revoke (NOIR) identifying inconsistencies in the Beneficiary's claimed work experience. During an interview with the U.S. Consulate in [redacted] Poland in 2018, [redacted] indicated that the Beneficiary had never worked with [redacted] Also, in July 2013, the Beneficiary submitted an F-1 visa application which did not list [redacted] in his employment history, instead listing his employment with [redacted] from March 15, 2010, to September 14, 2010.

The Director issued the NOIR for good and sufficient cause.[2] The Beneficiary's work experience provided on the labor certification contradicts the Beneficiary's employment history indicated on his visa application and [redacted] statements to the U.S. Consulate. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, the record lacked sufficient reliable evidence of the Beneficiary's qualifying experience for the offered position or the requested visa classification.

In response to the NOIR, the Petitioner explained that while the Beneficiary had worked for [redacted] the employment was unofficial since he was paid in cash and did not pay taxes. The Petitioner further

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Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d). In this case, the priority date is September 20, 2017.

[2] The NOIR also requested further evidence of the Petitioner's ability to pay the proffered wage. While the Director does not address the Petitioner's ability to pay in the revocation decision, we note that USCIS records indicate the Petitioner has submitted approximately 28 Form I-140 petitions on behalf of other beneficiaries.

explained that the Beneficiary did not list his employment with [redacted] on the visa application because it was not official employment, instead listing the government agency where he registered as being unemployed.

The Director revoked the petition's approval finding that the Petitioner did not submit independent, objective evidence to resolve the inconsistencies in the record and verify the Beneficiary's qualifying employment. The AAO agrees with the Director's finding that the record does not support the Petitioner's contention that the Beneficiary possessed the minimum experience required for the job opportunity under the labor certification.

On appeal, the Petitioner reasserts that the Beneficiary gained the minimum required 24 months of experience with [redacted] even though he was not officially employed by the organization. The Petitioner re-submits the certificates from [redacted] and the Beneficiary's statement.

The Petitioner reiterates that the employment listed on the Beneficiary's nonimmigrant visa application actually refers to his unemployment status, instead of any employment with [redacted] On appeal, the Petitioner submits letters to establish the Beneficiary's unemployment status with [redacted] The Petitioner submits a letter from [redacted] indicating the Beneficiary's retirement account balance as of December 31, 2010, and retirement contributions paid during 2010 from Labor Department of the City of [redacted] The Petitioner also submits a letter dated October 25, 2011, from the Department of Labor of [redacted] requesting the Beneficiary report to its office to confirm his readiness to be employed and a decision letter dated March 26, 2012, from Mayor of the [redacted] stating the Beneficiary's loss of status as an unemployed person. The Petitioner also submits a certification indicating that on May 21, 2012, the Beneficiary's mother requested that the Beneficiary be her registered family member for health insurance. Such documents provide further inconsistencies with the Beneficiary's claimed work experience with [redacted] since the documents appear to indicate the Beneficiary claimed to be in an unemployed status during the time he claims to have been working for [redacted]

The Petitioner asserts that the letters from [redacted] of [redacted] are sufficient to establish qualifying experience, citing to a decision from the Board of Alien Labor Certification Appeals (BALCA), Matter of B&B Residential Facility, 2001-INA-00146, 2002 WL 1586297 (BALCA July 16, 2002). In Matter of B&B Residential Facility, BALCA held that foreign nationals may rely on unpaid or under-the-table experience to qualify for offered positions on labor certifications. Matter of B&B Residential Facility, 2002 WL 1586297 at *3. However, the decision also stated that foreign nationals will "need to present credible supporting documentation of the work and/or corroborating affidavits or declarations of witnesses with personal knowledge." Id. The Petitioner also cites Matter of Lendy Muller, 98-INA-237 (BALCA September 17, 1999), explaining that illegal employment may be counted toward the experience requirements of the labor certification. As noted by the Petitioner, we are not bound by BALCA decisions. See 8 C.F.R. § 103.10(b) (stating that we are bound by decisions of the Board of Immigration Appeals and the Attorney General).

Here, the Petitioner relies on testimonial evidence from [redacted] of [redacted] to establish the Beneficiary's claimed under-the-table employment. The employment letters and certificate from [redacted] contradict his statements made during an interview with the U.S. Consulate when he

indicated that the Beneficiary had never been employed by [redacted] They also contradict the Beneficiary's nonimmigrant visa application which did not list his employment with [redacted] instead listing his employment with [redacted] from March 15, 2010, to September 14, 2010. The Petitioner has not submitted further supporting documentation or witness declarations corroborating the Beneficiary's work experience. Instead, the Petitioner submitted documentation seeking to explain that the Beneficiary registered as unemployed during the time he claims to have been working for [redacted]

The record also included discrepancies as to whether the Beneficiary worked full time with [redacted] A letter from [redacted] indicated the Beneficiary provided stone cutting-tile setting services at least 40 hours per week while other evidence in the record indicated the Beneficiary attended school at the same time he was working for [redacted] The Beneficiary's statement explained that he worked full time during the week and attended school every other weekend from 2009 to 2013 while obtaining his degree from European University of Information Technology and Economics. However, the Petitioner did not submit independent, objective evidence to substantiate the Beneficiary's statements that he attended school every other weekend.

A petitioner may submit a letter or affidavit that contains hearsay or biased information, but such factors will affect the weight to be accorded the evidence in an administrative proceeding. See Matter of D-R-, 25 I&N Dec. 445, 461 (BIA 2011). Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. See Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Id. Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence, both individually and within the context of the entire record, for relevance, probative value, and credibility. Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010).

Here, the Petitioner relies only on testimonial evidence to establish his claimed work experience, without providing independent, objective evidence in support of this testimony. Based on unresolved inconsistencies in the record, further independent evidence is required. The record does not include evidence contemporaneous with the Beneficiary's employment, such as income tax returns, payroll records, or bank statements, to corroborate his claimed employment. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Skirball Cultural Ctr., 25 I&N Dec. 799, 806 (AAO 2012).

The Petitioner has not established that the Beneficiary possesses the required 24 months of experience in the offered position, as required by the labor certification. We affirm the Director's revocation of the approved petition on this basis.

III. CONCLUSION

The record does not support a finding that the Beneficiary, more likely than not, possessed the minimum qualification required for the offered position as required under 8 C.F.R. § 204.5(1)(3). We considered all evidence of the Beneficiary's qualifying experience in the record, however, the inconsistencies in the record have not been resolved with independent, objective evidence. The

Petitioner has not established that the Beneficiary possesses the 24 months of experience required by the labor certification. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.