U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 14759511

Date: MAR. 16, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a provider of plumbing and construction-related services, seeks to employ the Beneficiary as a plumber's assistant. The company requests his 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 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 the *bona fides* of the job opportunity.

In revocation proceedings, the Petitioner 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) (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). Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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) 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 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, 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 properly issues 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 petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a NOIR response does not rebut alleged revocation grounds, USCIS properly revokes a petition's approval. *Id.* at 451-52.

II. THE BONA FIDES OF THE JOB OPPORTUNITY

We will withdraw the Director's finding that the Petitioner did not demonstrate the *bona fides* of the job opportunity.

III. THE REQUIRED EXPERIENCE

Despite the withdrawal of the revocation grounds, the record indicates USCIS' erroneous approval of the petition. The Petitioner did not demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position.[1]

A petitioner must 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).[2] 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).

The labor certification states the minimum requirements of the offered position of plumber's assistant as two years of experience "in the job offered." Experience "in the job offered" means experience performing the key duties of an offered position as listed on a labor certification. *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *2 (BALCA Oct. 24, 2011) (citations omitted).[3] The labor certification states that the position requires neither education nor training.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than two years of full-time experience as a plumber's assistant. He stated that he worked for a U.S.

[1] The Director's decision discusses the Beneficiary's work history but does not expressly find insufficient evidence of his claimed, qualifying experience.

[2] This petition's priority date is June 8, 2018, 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).

[3] Decisions of the Board of Alien Labor Certification Appeals (BALCA) do not bind USCIS. Rather, in proceedings involving the same or similar issues, Department of Homeland Security employees must follow precedent decisions of the Attorney General and Board of Immigration Appeals (BIA). 8 C.F.R. § 103.10(b). USCIS, however, may find BALCA decisions to be persuasive. *See also Martin v. Occupational Health and Safety Review Comm'n*, 499 U.S. 144, 156-58 (1991) (holding that an administrative agency should defer to reasonable, regulatory interpretations of a sister agency charged by Congress with enforcing the rules).

plumbing company from January 2008 to April 2010. The Beneficiary did not list any other related experience on the labor certification application.

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

Consistent with 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner provided a letter from the owner of the Beneficiary's claimed, former employer. The letter indicates that, from January 2008 to April 2010, the company "trained and educated" the Beneficiary on a full-time basis "about all plumbing aspects to complete plumbing work." The letter states that the Beneficiary "was not being rewarded or paid for his progress in education."

The letter does not demonstrate the Beneficiary's qualifying experience for the offered position. First, the letter states that the Beneficiary was "trained and educated." The labor certification indicates that the position requires work experience, rather than education or training. The Petitioner has not demonstrated that the Beneficiary worked for the claimed, former employer, as opposed to receiving education or training.

Second, even if the Beneficiary worked for the company from 2008 to 2010, the record would not demonstrate his qualifying experience. Unpaid work can constitute qualifying experience. *Matter of B&B Residential Facility*, 01-INA-146 (BALCA July 16, 2002). But, as the NOIR notes, online government information indicates that the Beneficiary's purported former employer did not begin operations until 2014. *See* Ill. Sec'y of State, "Corporation/LLC Search/Certificate of Good Standing," https://apps.ilsos.gov/corporatellc/. Thus, the record would not have explained how the Beneficiary worked for a company that had yet to be established. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

The Petitioner's NOIR response included an updated letter from the owner of the Beneficiary's purported former employer.[4] He stated that the Beneficiary worked from January 2008 to April 2010 for a prior business of his that dissolved in 2014. He said the company that issued the letter - the firm listed on the labor certification - incorporated in 2014 and "took over all clients and contracts" of the prior business. In verifying the Beneficiary's work with the prior business, the owner said that he inadvertently used the name of the current company.

The Petitioner provided corporate documentation confirming the dissolution of the prior business, the incorporation of the current company, and the signatory's management of both entities. The record, however, lacks sufficient, independent evidence of the Beneficiary's work for the prior business during the claimed period. The Petitioner argues that the letters from the businesses' owner are sufficient because the Beneficiary did not receive compensation and therefore lacks payroll or income tax records documenting his work. The Petitioner states that the Beneficiary worked at the prior business

[4] In February 2020, the Petitioner filed an amended petition for the Beneficiary, which included the updated letter and other evidence in the company's NOIR response in these petition proceedings. USCIS denied the amended petition, but the Petitioner did not appeal that decision.

to obtain a plumber's apprentice license and then worked for himself as a plumber's assistant. The Petitioner provided copies of the Beneficiary's annual plumber's apprentice licenses from 2010 through 2015. The Petitioner asserts that the Beneficiary could not have obtained the licenses "unless he had the requisite professional experience gained at [the prior business]." But, if the Beneficiary needed experience to obtain his apprentice plumber's licenses, he presumably submitted documentary evidence of his work to licensing authorities. The Petitioner has not explained why it has not submitted copies of such evidence. The letters submitted to USCIS are insufficient to establish that the Beneficiary has the required experience.

Moreover, the letters from the owner of the prior business do not establish the Beneficiary's experience "in the job offered." The job duties of the offered position include: supplying and holding materials/tools; cleaning work areas and equipment; performing "rough-ins;" repairing and replacing fixtures; locating and repairing leaking or broken pipes; mounting brackets and hangers; assisting in layout, assembly, and installation of piping; excavating and grading ditches; laying and joining pipe; and disassembling and removing damaged or worn pipes. The owner's letters do not detail specific duties that the Beneficiary performed. The letters therefore do not demonstrate the requisite experience "in the job offered."

The Petitioner also argues that the Beneficiary gained qualifying experience after he stopped working for the prior business in 2010. The Petitioner states that the Beneficiary provided plumber's assistant services as an independent contractor until 2015, when he formed his own corporation. The Petitioner states that the Beneficiary continued working as his company's sole employee until January 2020.

The Beneficiary, however, did not attest to experience after 2010 on the labor certification application. The Petitioner claims that the application omits the experience because the Beneficiary's prior work alone qualified him for the offered position. But the application's instructions required the listing of "all jobs the alien has held during the past 3 years" and "any other experience that qualifies the alien for the job opportunity." Thus, the omission from the labor certification application casts doubt on the Beneficiary's claimed, qualifying experience after 2010. *See Matter of Leung*, 16 I&N Dec. 12, 14 (Distr. Dir. 1976), *disapp'd of on other grounds by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (finding a claim of additional qualifying experience by an application for adjustment of status to be unreliable where he did not state the experience on his labor certification application).

The record contains a sworn statement from the Beneficiary and copies of his apprentice plumber licenses. But the record lacks independent, objective documentation that he worked as a plumber's assistant from 2010 to 2015. The Petitioner submitted copies of IRS Forms 1099, Miscellaneous Income, issued to the Beneficiary's company for 2015 and 2016. The Forms 1099, however, indicate that virtually all the revenues of the Beneficiary's company in those years came from his work for the Petitioner. DOL regulations bar a labor certification employer from relying on experience that a noncitizen gained with it, "including as a contract employee." 20 C.F.R. § 656.17(i)(3). An employer may use experience gained with it as a contractor if a noncitizen gained the experience in a position substantially different than the offered position or the employer can demonstrate the impracticality of training a U.S. worker for the position. 20 C.F.R. § 656.17(i)(3)(i), (ii). The Petitioner, however, has not demonstrated that the regulatory exceptions apply.

The Petitioner also submitted copies of federal income tax returns of the Beneficiary's company for 2015 through 2019. The tax returns, however, do not establish the company's receipt of revenues from customers other than the Petitioner. Also, the tax returns describe the Beneficiary's company as a "construction" business that provides "remodeling" services. Thus, the record does not sufficiently demonstrate that the Beneficiary gained qualifying experience in the offered position of plumber's assistant since 2010. *See Matter of Ho*, 19 I&N Dec, at 591 (requiring a petitioner to resolve inconsistencies of record).

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 remand the matter. On remand, the Director should issue a new NOIR explaining the evidentiary deficiencies discussed above.

IV. ABILITY TO PAY THE PROFFERED WAGE

The Petitioner also did not establish its 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.*

The labor certification states the proffered wage of the offered position of plumber's assistant as $32,885 a year. As previously noted, the petition's priority date is June 8, 2018. Thus, at the time of the petition's approval in May 2019, the Petitioner had to demonstrate its ability to pay the proffered wage in 2018 and 2019.

The Petitioner submitted a copy of its federal income tax return for 2017. The record, however, lacks regulatory required evidence of the company's ability to pay in 2018, the year of the petition's priority date, and 2019, the year of the petition's approval. The record therefore did not establish the Petitioner's ability to pay the proffered wage from the petition's priority date onward.

On remand, the new NOIR should ask the Petitioner to provide copies of annual reports, federal tax returns, or audited financial statements for 2018 and 2019. The Petitioner may also submit additional evidence of its ability to pay, including proof of any wages it paid the Beneficiary in those years or documentation supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

If supported by the record, the new NOIR may include additional, potential revocation grounds. The Director, however, should afford the Petitioner a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

V. CONCLUSION

We will withdraw the revocation of the petition's approval based on the *bona fides* of the job opportunity. The Petitioner, however, did not demonstrate the Beneficiary's possession of the

minimum experience required for the offered position or the company's ability to pay the position's proffered wage.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.