U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23033917

Date: MAR. 28, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Other Worker)

The Petitioner seeks to employ the Beneficiary as a worker at its cattle ranch/farm. The company requests his classification under the third-preference, immigrant visa category for "other workers." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This category allows a prospective employer to sponsor a noncitizen to permanently work in the United States in a position requiring less than two years of training or experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner's response to the Director's request for additional evidence (RFE) did not demonstrate the Beneficiary's qualifying experience for the offered position. On appeal, the Petitioner contends, in part, that, before denying the petition, the Director should have given the company another chance to submit proof and explain evidentiary inconsistencies of record.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the Director's RFE insufficiently notified the Petitioner of the required proof and the company's need to explain evidentiary discrepancies of record. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as an "other worker" generally follows a three-step process. First, a prospective employer must obtain U.S. Department of Labor (DOL) certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) permanent employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). 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)(3)(ii)(D), (4).

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.

II. ANALYSIS

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). This petition's priority date is September 4, 2020, 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).

When assessing a beneficiary's qualifications for an offered position, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum job requirements. USCIS may neither ignore a certification term nor impose unstated 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 Petitioner's labor certification states the minimum requirements of the offered position of farm/ranch worker as six months of experience "in the job offered." The certification states the position's job duties as "tending to farm & ranch animals, such as feeding, watering, herding, grazing, branding, birthing, loading & preparing animals for riding; cleaning & maintaining animal housing areas & related farm & ranch tasks."

The labor certification states that the offered position requires neither education nor training. Also, the certification indicates that the Petitioner will not accept experience in an alternate occupation. Further, according to part H.14 of the certification - "Specific skills or other requirements" - an "[a]pplicant [for the position] must be able to work outdoors in extreme weather conditions. Job requires pushing, pulling, walking & stooping for prolonged periods of time & carrying loads up to 50 lbs."

On the labor certification, the Beneficiary attested that, before the petition's September 2020 priority date, he gained more than 12 years of full-time, qualifying experience. A Mexican native and citizen, he stated that "[redacted]" employed him as a farm worker in [redacted] Mexico from January 2000 to February 2012.

To demonstrate 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 name, address, and title of the employer, and a description of the beneficiary's experience. *Id.* If such a letter is unavailable, USCIS will consider other documentation relating to a beneficiary's experience. 8 C.F.R. § 204.5(g)(1).

Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner's initial filing lacked a letter from the Beneficiary's purported former employer in Mexico. The Director issued the RFE, noting

discrepancies between the Beneficiary's resume and the qualifying experience he listed on the labor certification. The resume states his employment as a farm/ranch worker in Mexico from 1979 (when he was about 13 years old) to 2013, not from January 2000 to February 2012 as listed on the certification. Also, although the labor certification identifies his Mexican employer as [redacted] the resume does not name his employer(s) from 1979 to 2013. The RFE correctly finds the resume unacceptable proof of the Beneficiary's qualifying experience and requests:

> a copy of letter(s) from current or former employer(s). The letters of experience, preferably on the employer's official letterhead, must list the writer's name, address, and title, and a specific description of the beneficiary's duties. The letter should also include the beneficiary's dates of employment.

As the RFE requested, the Petitioner provided a letter from a purported Mexican employer, verifying the Beneficiary's employment as a farm/ranch worker. Unlike the labor certification, however, the letter does not identify his former employer as [redacted] or state his employment from January 2000 to February 2012. Rather, the letter identifies a Mexican employer unnamed on the labor certification or resume and states the business's employment of the Beneficiary from about December 2005 to December 2006. Also, although the letter's stationery states the location of the purported former employer in the Mexican state of [redacted], the stationery lists a different town than [redacted] as claimed on the labor certification and resume. Despite the inconsistencies, the Petitioner asserted that the letter substantiates the Beneficiary's claimed qualifying experience. The company suggested that the Beneficiary worked for multiple employers in Mexico, stating that "[t]he Beneficiary listed [redacted] [as his former employer on the labor certification] because it refers to various farms and ranches in his community, where he worked, including [the farm/ranch that provided the letter]."

The Director denied the petition, noting that the letter supporting the Beneficiary's qualifying experience came from a purported former employer omitted from the labor certification. USCIS may discount claimed former employment as not credible if a labor certification omits the purported, qualifying experience. *Matter of Leung*, 16 I&N Dec. 12, 14-15 (Distr. Dir. 1976), *disapp'd of on another ground by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978). The Director further concluded that the Petitioner did not sufficiently resolve discrepancies regarding the Beneficiary's purported former employer. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies).

On appeal, the Petitioner contends that, before denying the petition, the Director should have issued a second RFE or a notice of intent to deny (NOID) the filing. The company cites a 2021 USCIS policy alert, which states:

> In order to reduce barriers that may impede access to immigration benefits and ensure the agency is fairly and efficiently adjudicating immigration benefit requests, USCIS is returning to the principles of [prior] policy by issuing RFEs and NOIDs when additional evidence could demonstrate eligibility for an immigration benefit.

USCIS Policy Alert, PA-2021-11, *Requests for Evidence and Notices of Intent to Deny* (Jun. 9, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates.

The company asserts that it "made a reasonable effort" to submit evidence the RFE requests. If USCIS "was not satisfied with the evidence," the company contends that the Agency should have issued another notice "in order to reduce barriers that may impede access to immigration benefits."

We agree that the Director should have issued another RFE or NOID. But not for the reason the Petitioner asserts. The company cites the USCIS policy alert out of context. The alert changed a policy that allowed Agency adjudicators to "deny benefit requests for lack of initial evidence without *first* sending an RFE or NOID." USCIS Policy Alert, PA-2021-11 at 1. Before denying the Petitioner's filing, the Director sent an RFE. Thus, contrary to the Petitioner's contention, the Director complied with current USCIS policy in that respect. The Director's RFE, however, did not sufficiently notify the Petitioner of the evidence required to demonstrate the Beneficiary's qualifying experience or the company's need to resolve evidentiary inconsistencies.

As previously indicated, the Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of evidence. *See Matter of Chawathe*, 25 I&N Dec. at 375-76. But USCIS should issue a RFE or NOID if a petitioner has not submitted all required initial evidence or the evidence does not establish eligibility for the benefit sought.[1] *See generally* 1 *USCIS Policy Manual* E.(6)(F)(3), https://www.uscis.gov/policy-manual. An RFE should:

- Identify the eligibility requirement(s) that has not been established and why the evidence submitted is insufficient;
- Identify any missing evidence specifically required by the applicable statute, regulation, or form instructions;
- Identify examples of other evidence that may be submitted to establish eligibility; and
- Request that evidence.

Id. An RFE should also ask for all the evidence USCIS anticipates needing to determine eligibility. *Id.*

The Director's RFE does not sufficiently: explain why the Petitioner's evidence did not demonstrate the Beneficiary's qualifying experience for the offered position; identify the missing evidence needed; or request all the evidence needed to determine eligibility. The RFE cites discrepancies between the Beneficiary's resume and the labor certification regarding his Mexican employment. But the notice does not explain the Petitioner's need to resolve inconsistencies with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591. The RFE also does not explain the company's need to demonstrate any unavailability of employer letters. *See* 8 C.F.R. § 204.5(g)(1).

Before denying the petition based on the labor certification's omission of a purported former employer and alleged inconsistencies in the Beneficiary's claimed qualifying experience, the Director should have notified the Petitioner of the proposed denial grounds and afforded it a reasonable opportunity to respond with evidence and/or explanation. We will therefore withdraw the Director's decision and remand the matter.

[1] USCIS may deny a benefit request without first issuing an RFE or NOID, however, if "there is no legal basis for the benefit request and no possibility that additional information or explanation will establish a legal basis for approval." *See generally* 1 *USCIS Policy Manual* E.(6)(F)(3); *see also* 8 C.F.R. § 103.2(b)(8)(ii), (iii).

On remand, the Director should mail the Petitioner a second RFE or NOID, more fully explaining the proposed denial grounds. The new notice should state that USCIS may discount claimed former employment omitted on a labor certification and the Petitioner's needs to resolve inconsistencies with independent, objective evidence and demonstrate any unavailability of employer letters.[2]

III. CONCLUSION

The Director's RFE insufficiently notified the Petitioner of evidence required to demonstrate the Beneficiary's qualifying experience for the offered position and the company's need to resolve evidentiary inconsistencies of record.

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

[2] Because issuance of another RFE or NOID resolves this matter, we need not address the Petitioner's other appellate arguments. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule, courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.") (citation omitted).