U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18705356

Date: AUG. 24, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a construction firm, seeks to employ the Beneficiary as a mason. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. 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 residence 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 based on the Beneficiary's interview at the U.S. Embassy in Islamabad, Pakistan, in which the consular officer determined that the evidence regarding the Beneficiary's work experience was not credible. The Director ultimately revoked the petition after reviewing the Petitioner's response to the notice of intent to revoke (NOIR), concluding, among other things, that the Petitioner did not demonstrate the Beneficiary has the minimum employment experience required for the offered position.

On appeal, the Petitioner disputes the Director's description of the Beneficiary's consular interview and asserts that the Beneficiary sufficiently documented his employment history as a mason at the interview. The Petitioner also asserts that it did not receive sufficient notice of the derogatory information referenced by the U.S. Department of State (DOS) as the basis for refusing the Beneficiary's immigrant visa, which the Director referred to in his NOIR and revocation notices. The Petitioner requests that the revocation decision be withdrawn, and the approval of the petition reinstated.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration, including the issue of whether the Beneficiary meets the work experience requirements of the labor certification.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section

212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition (Form I-140) with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national 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.

USCIS approves a filing if "the facts stated in the petition are true" and the beneficiary qualifies for the requested immigrant visa category. Section 204(b) of the Act. A petition includes any supporting evidence - including a labor certification. 8 C.F.R. § 103.2(b)(1). Thus, USCIS can't approve a petition if the facts stated on an accompanying labor certification are untrue.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." 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). A NOIR "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

II. THE REQUIRED WORK 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). This petition's priority date is September 6, 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). When 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 accompanying labor certification states the minimum requirements of the offered position as two years of experience "in the job offered." The certification states that the job duties of the position entail "work in construction area for masonry work, lay and bind building materials such as bricks, tiles, concrete block etc. with mortar and other substances to construct and repair walls, ceilings, partitions, sewers and other structures." Per the labor certification, the position requires specific skills:

"experience in brick/tile laying along with other construction," but does not require training. The certification also indicates that the Petitioner won't accept experience in an alternate occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he had about four years and eight months of full-time, qualifying work experience in Pakistan as follows:

Date	Position	Employer
04/2014 to 09/2016	Mason	[redacted]
01/2012 to 03/2014	Carpenter/tile layer	[redacted]

Documentary evidence relating to his employment was submitted with the petition and USCIS approved the petition in September 2017. In December 2020, the Director issued a NOIR on the ground that the Beneficiary did not have the requisite two years of qualifying experience. The NOIR focused almost exclusively on the Beneficiary's interview at the U.S. Embassy in Islamabad, Pakistan, in which the Beneficiary was questioned about his work history. As summarized by the Director from DOS' consular return report, the Beneficiary was unable to provide credible documentation of his work experience as a mason, noting that he provided inconsistent and incredible information relating to the work experience he had attested to in the labor certification, as follows:

> In an interview conducted at U.S. Embassy Islamabad, the [Beneficiary] was unable to discuss any of his prior work experience in his field. He demonstrated no basic knowledge of the trade nor simple aspects of the work he would be doing. The letters he submitted in support of his claimed work experience appeared to be based on standard templates. A Pakistani government website confirmed that the Beneficiary had a completely different business selling and showing vehicles.

The Director indicated in the NOIR that the Petitioner had willfully misrepresented a material fact by falsifying the Beneficiary's work experience in the labor certification, noting that pursuant to 8 C.F.R. § 204.5, the labor certification is material to the adjudication of the petition. The Petitioner was granted 30 days to submit evidence in support of the petition and in opposition to the revocation.

In response to the Director's NOIR, the Petitioner provided a February 2021 statement from the Beneficiary in which he alleged that the substantive information outlined therein of the consular interview was inaccurate. He maintained that he was only asked one question about his employment as a mason. He alleged that the consular officer conducted himself in an unprofessional manner, asserting that the consular officer attempted to intimidate him during the interview and was trying to find a way to refuse the immigrant visa, which caused him to wonder if the consular officer was discriminating against him. He also noted that he had not been provided with the information from the Pakistani government that the consular officer referenced, noting that if USCIS had provided this information to him, that he would be better able to address the concerns outlined in the NOIR.

With regard to the adverse information in the NOIR about the use of templates in his work experience letters, the Beneficiary indicated that prior to filing an immigrant visa petition he "was not aware of and [had] never seen experience letters." He acknowledged that "my former employers did not know exactly what they needed to write," so he "obtained a sample and passed it along to those who issued letters describing my experience."

In March 2021, the Director issued a decision revoking the petition's approval. After acknowledging that the Petitioner submitted a statement from the Beneficiary in the NOIR response, the Director repeated the grounds for revocation in the NOIR verbatim and revoked the approval of the petition.[1] It is noteworthy that none of the documentation submitted in the NOIR response was mentioned or discussed in the revocation decision, beyond the Director's acknowledgement that the Petitioner had provided a statement from the Beneficiary. The Director focused instead on the consular return report which addressed aspects of the Beneficiary's interview at the U.S. Embassy in Islamabad. The Director did not discuss any of the supplemental materials submitted by the Petitioner as evidence of the Beneficiary's experience as a mason, much less determine the probative value and credibility of those materials, or the lack thereof. Additionally, the Director did not address the Petitioner's concerns about the lack of detail provided in the NOIR regarding the specific adverse information referenced by DOS in the consular return report.

An important issue in this matter is whether the Director had good and sufficient cause to issue the NOIR; specifically, whether "the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant [the revocation] of the visa petition based upon the petitioner's failure to meet his burden of proof." *Matter of Estime*, 19 l&N Dec. at 450. We conclude that the Director's NOIR and subsequent revocation notice were insufficient to meet the requirements for such notices at 8 C.F.R. § 205.2(b) and (c). As discussed, a NOIR "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Estime*, 19 l&N Dec. at 450.

Considering the foregoing deficiencies, we are withdrawing the Director's revocation and remanding the petition so that the Director can issue a new NOIR that comports with the regulatory requirements and will allow the Petitioner an opportunity to address any issues raised therein. Additionally, if the Director believes that the record supports a finding of a misrepresentation of the Beneficiary's work experience on the labor certification, the new NOIR should so state and explain, allowing the Petitioner a chance to respond.[2]

The Petitioner filed the appeal in May 2021, accompanied by a brief, new letters from the Beneficiary's former employers to establish the Beneficiary's qualifying work experience, a statement from the Petitioner, as well as copies of other evidence previously provided in the Petitioner's response to the NOIR. Thus, we are also remanding the matter to the Director to consider the new evidence provided on appeal in the first instance, as well as the previously submitted evidence, to determine whether the Petitioner has demonstrated that the Beneficiary qualifies for the EB-3 classification as a skilled worker, and whether he meets the specific requirements of the labor certification.

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[1] We note that the Petitioner also provided documentation in the NOIR response which provided general information about the mason occupation, and examples of instances where USCIS has used templates in its correspondence with the public.

[2] A finding of willful misrepresentation in these proceedings wouldn't constitute a determination of the Beneficiary's admissibility to the United States. *See* section 212(a)(6)(C)(i) of the Act (stating that noncitizens who willfully misrepresent material facts when seeking visas render themselves inadmissible). Visa petition proceedings are inappropriate fora for making substantive, admissibility determinations. *Matter of O-*, 8 I&N Dec. 295, 296 97 (BIA 1959). USCIS decisions, however, should include specific findings and conclusions on any material issues of law or fact that arise in a case, including issues of fraud or material misrepresentation. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also* 5 U.S.C. § 557(c). Thus, if USCIS determines that the Beneficiary willfully misrepresented his qualifying experience, he may later be found inadmissible in separate proceedings.

On appeal, the Petitioner resubmits the Beneficiary's February 2021 statement in which he alleges that the consular officer conducted himself in an unprofessional manner during the visa interview at the U.S. Embassy. We conclude the Beneficiary's generalized, *ad hominem* allegations of bias or impropriety on the part of the consular officer during his immigrant visa interview are insufficient to "overcome a presumption of honesty and integrity in those serving as [consular officers]." *Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975); *See also Parsons v. United States*, 670 F.2d 164, 166 (1982) ("There is presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations, and [the] burden is on [the Petitioner] to prove otherwise."); *Romero v. Trav*, 33 Vet.App. 252, 262-64 (2021). Without more, the Petitioner has not substantiated the Beneficiary's allegations with his unsupported testimonial evidence. *Matter of Chawathe*, 25 I&N Dec. at 376.

The Petitioner also asserts on appeal that USCIS "failed to provide a transcript or verbatim narrative of the Beneficiary's interview" at the U.S. Embassy in Islamabad. USCIS has no obligation to withhold adjudication of an appeal pursuant to a request for a copy of the record. Furthermore, the record bears no indication that the Applicant has sought to obtain his records through a Freedom of Information Act Request (FOIA). If he wishes to obtain a copy of the record, he may file a FOIA request. *See* https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act and https://foia.state.gov/request/foia.aspx.

Additionally, other evidence not discussed by the Director casts doubt on the Petitioner's evidence of the Beneficiary's work experience. For instance, the Beneficiary indicated that he had not been provided information given by the Pakistani government which the Director briefly mentioned in the NOIR and revocation notice. To clarify this issue, we note that the U.S. Embassy received verification from the Federal Board of Revenue (FBR) of the Government of Pakistan that the Beneficiary owns a business, [redacted] [ATC-], Registration number [redacted]

According to open-source information recently obtained by USCIS, ATC- is a general trading business that operates at Office No. [redacted] Pakistan, which is the same address listed by the Beneficiary as his home address in (1) part J of the labor certification, (2) part 3 of the Form I-140 Petition, and (3) his February 2021 statement.[3] Further, the contact person for this business, other than the Beneficiary, is [redacted] who according to USCIS records is the Beneficiary's paternal uncle, (the brother of his father, [redacted]. The Petitioner should be prepared to provide probative evidence and information about the nature and duration of the Beneficiary's ownership of and employment with ATC- in support of this petition or other relevant immigration filings.

While not discussed by the Director, we also observe that though the Petitioner presented work experience letters as evidence of the Beneficiary's qualifying employment as a mason from January 2012 onward, the record contains evidence asserting the Beneficiary was attending university in pursuit of a bachelor's degree within this time period. Specifically, the Beneficiary attested in part J of the labor certification that he obtained a Bachelor of Arts from the University of [redacted] in 2016. He signed the labor certification application declaring under penalty of perjury that he reviewed the

[3] *See* https://www.lahoreindustry.com/[redacted] and https://branches.pk/branch-detail/[redacted].

document and that its information was true and correct. See *Matter of Valdez*, 27 I&N Dec. 496 (BIA 2018) (holding that a noncitizen's signature on an immigration filing creates a "strong presumption" that they knew and assented to the filing's contents). The Beneficiary also noted this information in his resume.

The Director should consider whether the record contains sufficient independent, objective evidence - such as tax records, contemporaneous business documents, and copies of the Beneficiary's post-secondary academic degree and course transcripts – to support the Beneficiary's asserted concurrent academic pursuits and his employment as a mason in the labor certification. He should also consider whether the Petitioner has adequately clarified whether the Beneficiary worked full-time or part-time for his employers during this time period, and whether he was engaged in a full-time or part-time program of study in the years leading up to earning his bachelor's degree in 2016. Notably, while the submitted employment letters indicate the duration of the Beneficiary's employment from 2012 until at least the priority date, they do not identify whether the Beneficiary was employed on a full-time or a part-time basis.

For labor certification purposes, part-time experience equals less than full-time experience. *See, e.g.*, *Matter of 1 Grand Express*, 2014-PER-00783, slip op. at **3-4 (BALCA Jan. 26, 2018) (equating a noncitizen's 25-hour-a-week job to 62.5% of full-time, 40-hour-a-week experience). Thus, even if the Beneficiary simultaneously worked for his employers and attended university, the Director should consider whether the record substantiates the number of hours that he was employed as a mason during this timeframe in order to demonstrate his acquisition of sufficient, qualifying work experience by the petition's priority date.[4]

The Petitioner should be prepared to address the aforementioned inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies, in support of this petition or other relevant immigration filings. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

III. UNDISCLOSED FAMILIAL RELATIONSHIP

Although not addressed by the Director, evidence indicates the Petitioner's misrepresentation of a different fact on the labor certification application. Asked on the application "is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the [noncitizen]?" the Petitioner indicated "No." USCIS records, however, indicate that the Beneficiary is the brother of the son-in-law of the Petitioner's president. The president is the signatory in this petition, the supporting labor certification, and in the appeal. USCIS records show that the Beneficiary's brother [redacted] lists the Beneficiary's parents as his own. [redacted] is married to [redacted] and her father is listed as [redacted] the president of the petitioning entity. Thus, the Beneficiary appears to be the brother of the son-in-law of the Petitioner's president.

"A familial relationship includes any relationship establish by blood, marriage, or adoption, even if distant." DOL, Office of Foreign Labor Certification Frequently Asked Questions and Answers,

[4] We also observe that a USCIS immigration officer contacted the Beneficiary's former employers via the email addresses provided in their letters on July 1, 2022 in order to verify his qualifying employment with them. To date, USCIS has received no response from these businesses, and thus has been unable to substantiate the Beneficiary's claimed qualifying work experience via their email accounts.

"Family Relationships," Q.1, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm. Also, [redacted] petitioned for [redacted] as the fiancé of a U.S. citizen in 2010, and the conditions were removed from [redacted] resulting lawful permanent resident status based on a joint petition filed by the couple in 2014, which indicates that they were married prior to the filing of the labor certification in 2016. Thus, the Petitioner appears to have concealed the relationship between its president and the Beneficiary on the labor certification. The Petitioner should be prepared to provide probative evidence and information about the nature of its president's familial relationship with the Beneficiary in this petition or other relevant immigration proceedings.

IV. ABILITY TO PAY

The Director also did not address in his NOIR that the record does not establish the Petitioner's 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). If a petitioner employs less than 100 people, as here, evidence of ability to pay must 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 manager as $81,500 a year. As previously noted, the petition's priority date is September 6, 2016. The Petitioner submitted copies of its federal income tax returns for 2016. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks regulatory required evidence of the Petitioner's ability to pay in 2017, or thereafter. The Petitioner therefore hasn't demonstrated its ability to pay the proffered wage from the petition's priority date onward. On remand, the new NOIR should ask the Petitioner to submit copies of annual reports, federal tax returns, or audited financial statements for 2017 to 2021. The Petitioner may also submit additional evidence of its ability to pay in those years, including proof of any wages it paid the Beneficiary and materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

V. CONCLUSION

Considering the above discussed deficiencies, we are withdrawing the Director's revocation and remanding the petition to allow the Petitioner an opportunity to address them. On remand, the Director should issue a new NOIR outlining aspects of the evidence in the record that he deems deficient and allowing the Petitioner an opportunity to respond. The Director should consider the entire record, including any new evidence submitted and, if deficient, must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme. The content of that notice and the consideration of any evidence submitted by the Petitioner should comply with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. The Director shall then issue a new decision.

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