U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22972466

Date: DEC. 01, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a wholesale importer of costume jewelry, seeks to employ the Beneficiary as a marketing specialist. 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.

After initially granting the petition, the Director of the Nebraska Service Center revoked the petition's approval. The Director found that the Petitioner failed to disclose a familial relationship with the Beneficiary on the labor certification. The Director entered a finding of willful misrepresentation of a material fact against the Petitioner. On appeal, we withdrew the Director's findings and remanded the matter for consideration of inconsistencies in the record and other potential grounds of revocation.

Following the remand of the petition, the Director issued a new notice of intent to revoke (NOIR), pointing to contradictory information in the record. After receiving the Petitioner's response to the NOIR, the Director again revoked the petition's approval. The Director determined the record did not establish that the Beneficiary possessed the work experience for the offered job as required under the labor certification. The Director also determined that the Petitioner did not submit sufficient evidence of its ability to pay the proffered wage. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal because the Petitioner did not sufficiently establish that the Beneficiary had the required work experience. Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding its ability to pay the proffered wage. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) (holding that "agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); see also Matter of L-A-C-, 26 I&N Dec. 516, 526 n. 7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

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) to establish that there are not sufficient U.S. workers who are available for the offered position. 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] 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

In this case, the labor certification states that the offered position requires a bachelor's degree in marketing and 24 months of work experience, or in the alternative, no minimum education and 48 months of work experience in consumer marketing and sales in the fashion jewelry industry.

The labor certification indicates the Beneficiary does not have the requisite education; however, claims to have the alternate 48 months of work experience listing his employment as follows:

- president of [redacted] from June 10, 2013, to June 30, 2015, and
- president of [redacted] from May 1, 2005, to May 30, 2013.

The initial evidence submitted with the petition included a letter from the general manager of [redacted] attesting to the Beneficiary's work experience. The Petitioner has not submitted evidence relating to the Beneficiary's work experience with [redacted]

[1] These requirements must be satisfied by the priority date of the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2), 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 March 24, 2016.

The Director identified inconsistencies in the Beneficiary's record. Specifically, the Beneficiary submitted a nonimmigrant visa application in 2013 listing his current employer as [redacted] contradicting the labor certification which does not list [redacted] in his employment history. On the same nonimmigrant visa application, the Beneficiary listed two previous employers, [redacted] from May 1, 2009, to February 28, 2013, and [redacted] from October 1, 2005, to March 30, 2009. These dates listed in the nonimmigrant visa contradict the labor certification and the experience letter. Also, the Beneficiary did not indicate employment with [redacted] on the labor certification. The inconsistencies in the record cast doubt as to the Beneficiary's claimed qualifying experience for the offered position.

The Director identified the inconsistencies in the Beneficiary's claimed employment history in the NOIR. The Petitioner was provided an opportunity to respond and establish that the Beneficiary met the required work experience as of the priority date. The Director specifically requested "independent objective evidence to explain this discrepancy and enhance the credibility of this experience. This evidence may include, but is not limited to, the following: [t]ax records; [e]mployment records; [p]ay stubs; and [w]age and [t]ax statements (Form W-2)."

The Director issued the NOIR for good and sufficient cause. The dates of employment that the Beneficiary provided on the labor certification contradict the dates in the Beneficiary's sworn nonimmigrant visa application. 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 the Beneficiary disclosed all his employment history on the nonimmigrant visa application having owned and operated multiple entities simultaneously. As evidence of the Beneficiary's ownership of the entities, the Petitioner submitted documents related to various businesses. The Petitioner submitted a certificate of business for [redacted] verified on April 28, 2008, indicating its business as wholesale/retail trade in jewelry accessories, the Beneficiary as president, its registration date of April 3, 2003, and its business start date of April 2, 2004. With respect to [redacted] the Petitioner submitted a letter signed October 13, 2004, from [redacted] to [redacted] Revenue Department of Business Registration Office registering a company agent; its business registration certificate from August 10, 2012, to July 10, 2013; and six invoices from September 20, 2009, to February 16, 2010. Lastly, the Petitioner submitted a business certificate for [redacted] indicating the Beneficiary as president and the date it opened business as March 17, 2010.

The Director concluded that the Petitioner did not submit independent objective evidence to resolve the inconsistencies and verify the Beneficiary's qualifying employment. In the notice of revocation (NOR), the Director noted that the Petitioner did not provide an explanation for the contradictions to the Beneficiary's work experience attested to in the labor certification with the employment history reported on the Beneficiary's nonimmigrant visa application. The Director explained that while the business registration certificate for [redacted] lists the Beneficiary as president and that the business commenced business on April 2, 2004, as a wholesale/retail trade business of jewelry accessories, the certificate does not establish the Beneficiary's work experience with the company from May 1, 2009, to

February 28, 2013, as attested to on the labor certification, and as indicated in the employment verification letter. The Director noted that the documentary evidence relating to the other business entities listed in the Beneficiary's nonimmigrant visa application, [redacted] and [redacted] did not clarify the inconsistencies in the record or provide evidence to establish the Beneficiary's work experience required under the labor certification. We agree with the Director.

On appeal, the Petitioner relies on the documentary evidence submitted with the NOIR reply, asserting the business documents sufficiently verify the Beneficiary's previous employment and work experience required under the labor certification. The Petitioner argues that the documents submitted are business records and public records maintained in accordance with the Federal Rules of Evidence under Title 28 of the U.S.C., and such records directly support the Petitioner's assertions of the Beneficiary's operation of the businesses and his work experience from these businesses. The Petitioner notes, through counsel, that the Beneficiary worked at these entities simultaneously and his "non-disclosure of the two companies at the time of visa application is not material to the . . . petition . . . because [the Beneficiary] simply and truthfully listed one of the companies he was operating on the visa application. The most relevant fact is that he possessed the required 48 months experience for the position offered in the labor certification." The Petitioner argues "the evidentiary documentation in support of [the Beneficiary's] employment with [redacted] and [redacted] meet the preponderance of evidence standard of review required for this case."

While the Petitioner's counsel asserts the Beneficiary operated companies simultaneously, the record lacks corroborating evidence, such as an affidavit or statement from the Beneficiary. Assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. Without additional evidence, counsel's assertion does not establish that the Beneficiary worked at the two entities simultaneously.

Furthermore, we note the Petitioner does not explain why the Beneficiary did not disclose all of his employment history on the nonimmigrant visa application or on the labor certification. The Petitioner also has not clarified the actual dates of the Beneficiary's employment history. The business documents show the existence of companies listed in the Beneficiary's nonimmigrant visa application and the labor certification, and that the Beneficiary was an owner and/or officer of these business entities at certain times. However, the documents do not provide independent, objective evidence demonstrating the Beneficiary's employment, including job responsibilities, dates of employment, and whether the employment was full time.

The Petitioner has not established by a preponderance of the evidence that the Beneficiary gained 48 months of qualifying work experience. The record does not include evidence contemporaneous with the Beneficiary's employment, such as income tax or payroll records, to corroborate his claimed work experience. 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).

As the inconsistencies in the record have not been resolved, the Petitioner has not established with independent, objective evidence that the Beneficiary possesses the required 48 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.

ORDER: The appeal is dismissed.