U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 01651704

Date: JUL. 8, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a restaurant operator, sought to employ the Beneficiary as a chef specializing in Japanese cuisine. The company requested his classification under the third-preference, immigrant category as a skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

After first granting the filing, the Acting Director of the Nebraska Service Center revoked the petition's approval. The Acting Director concluded that the record at the time of approval did not establish the Beneficiary's possession of the minimum experience required for the offered position. The Acting Director also found insufficient evidence of the Petitioner's required intent to employ the Beneficiary in the job. Additionally, the Acting Director ruled that, on the accompanying certification from the U.S. Department of Labor (DOL), the Beneficiary willfully misrepresented his employment experience.

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) (discussing the burden of proof in petition revocation proceedings); *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 obtain DOL 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 will 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 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.

At 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) 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). The Agency properly revokes a petition's approval if a petitioner's NOIR response does not rebut or resolve the stated revocation grounds. *Id.* at 451-52.

II. THE PETITIONER'S INTENT TO EMPLOY THE BENEFICIARY

A business may file a Form I-140 petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis).

On the petition and labor certification, the Petitioner attested to its intent to permanently employ the Beneficiary in the offered position of specialty chef on a full-time basis. The Acting Director's NOIR, however, noted that, at the Beneficiary's adjustment interview, he testified to, and submitted evidence of, the Petitioner's employment of him as a chef on a part-time basis for 20 to 25 hours a week. Because the company did not employ the Beneficiary full-time as stated in its job offer, the NOIR alleged that the Petitioner did not intend to employ him in the offered position.

As the Petitioner argues, however, Form I-140 petitions represent offers of "prospective employment." *See* Final Rule for Retention of EB-1, EB-2, and EB-3 Immigrant Workers, 81 Fed. Reg. 82398, 82416 (Nov. 18, 2016). The Petitioner therefore need not have employed the Beneficiary in the offered position until he obtained lawful permanent residence. *See also Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009) (stating that "[a]n alien is not required to have been employed by the certified employer prior to adjustment of status").

Also, the Petitioner's NOIR response included a letter from its president, stating the company's intent to employ the Beneficiary in the full-time, permanent position upon his receipt of lawful permanent residence. The company's part-time employment of the Beneficiary is therefore insufficient evidence that it did not intend to employ him full-time and permanently.

The Beneficiary ultimately accepted a permanent, full-time job offer from another employer and asked USCIS to "port" his approved petition to the new employer. *See* section 204(j) of the Act (allowing approved petitions of qualified beneficiaries to remain valid if they switch jobs or employers). The Beneficiary's job change, however, did not occur until December 2016, about a year after the petition's

approval. Thus, at the time of the petition's approval, a preponderance of evidence supported the Petitioner's intent to employ the Beneficiary in the offered job.

For the foregoing reasons, the Petitioner's part-time employment of the Beneficiary did not support a finding that the company lacked intent to employ him in the full-time, offered position. We will therefore withdraw the Director's contrary finding.

III. THE BENEFICIARY'S ALLEGED MISREPRESENTATION

To approve a Form I-140 petition, USCIS must determine that "the facts stated in the petition are true." Section 204(b) of the Act. A petition comprises its supporting evidence, including an accompanying labor certification. 8 C.F.R. § 103.2(b)(1). Thus, USCIS cannot approve a petition if the facts stated on the labor certification are untrue.

Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matters of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (citations omitted). A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* Noncitizens' signatures on immigration applications establish "strong presumptions" that they knew the contents of the applications and assented to them. *Id.* at 499.

The Acting Director found that, on the labor certification, the Beneficiary willfully misrepresented a material fact: his claimed, qualifying employment experience for the offered position. The labor certification states that the offered position of specialty chef requires at least two years of experience in the job offered. The Beneficiary attested that he worked full-time for more than three years, from March 2003 to May 2006, as a chef at a restaurant in South Korea that served Japanese food. The Petitioner also submitted a letter from his purported former manager at the restaurant.

But, at the 2016 interview regarding his application for adjustment of status, the Beneficiary reportedly told a USCIS officer that, in South Korea from 2002 to 2006, he owned a pub and a "cleaning business." The Beneficiary's apparent self-employment from 2002 to 2006 cast substantial doubt on his claimed, qualifying experience during the same period. The Acting Director therefore properly issued a NOIR regarding the alleged misrepresentation.

In the Petitioner's NOIR response, the Beneficiary disputed USCIS' account of his testimony at the adjustment interview. He acknowledged testifying to his ownership of the pub and cleaning business in South Korea. But he denied stating that he owned or worked at the businesses continuously from 2002 to 2006. Rather, he stated that he owned the pub for about four months, from January 2003 to May 2003. He said he stopped working at the pub and left the business in his brother's management to work for the restaurant from March 2003 to May 2006. The Beneficiary stated that, after leaving the restaurant, he acquired a laundromat, which he owned from October 2006 to June 2007.

The Petitioner submitted documentation supporting the Beneficiary's claims. Copies of certificates from South Korean tax offices indicate that the Beneficiary's pub operated from January 2003 to May 2003, and that his laundromat commenced business in October 2006 before closing in June 2007. A 2008 "certificate of employment" also confirms his employment dates at the restaurant. Additionally,

the Petitioner submitted statements from four purported former co-workers of the Beneficiary at the restaurant, confirming his employment dates and duties.

The Acting Director found the documents inconsistent with other evidence. The Beneficiary stated that he began working at the South Korean restaurant in March 2003. But the Acting Director noted that the Beneficiary's claimed ownership of the pub did not end until May 2003. The Acting Director also noted that a closure certificate identified the business as a "restaurant," not a pub.

The record does not sufficiently support the Beneficiary's alleged misrepresentation of his qualifying experience. The South Korean tax certificates support his claim that he did not continuously work at the pub and laundromat from 2002 to 2006. Also, the documents in the Petitioner's NOIR response do not conflict with other evidence. The Beneficiary stated that he owned the pub from January 2003 to May 2003, not that he worked there for the entire period.

For the foregoing reasons, substantial evidence did not support the NOIR's allegation that the Beneficiary misrepresented his qualifying experience on the labor certification. We will therefore withdraw the Acting Director's contrary finding. But, as discussed below, the record contains additional derogatory evidence regarding the Beneficiary's claimed, qualifying experience.

IV. THE REQUIRED EXPERIENCE

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements 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 August 12, 2014, 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).

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 Petitioner's labor certification states that the offered position of specialty chef requires a U.S. high school diploma or a foreign educational equivalent, and at least two years of experience in the job offered. The Beneficiary's educational qualifications are not at issue.

As previously discussed, the Beneficiary attested that he gained more than three years of full-time, qualifying experience in the offered position at the South Korean restaurant from March 2003 to May 2006. The South Korean tax certificates appear to support the Beneficiary's claim.

The NOIR, however, did not notify the Petitioner of additional derogatory evidence. On an application for a U.S. visitor's visa in November 2006, the Beneficiary stated that he then worked as an assistant manager at a construction company in South Korea. Also, asked on the application's supplement to list his prior two employers, the Beneficiary stated: "None."

The Beneficiary's responses on the visa application appear to conflict with his claims that he operated his laundromat from October 2006 to June 2007 and that he previously worked at the restaurant and his pub. The Petitioner must resolve these inconsistencies of record with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591.

Also, the letter and statements from the Beneficiary's purported former manager and co-workers at the restaurant are unreliable. Consistent with 8 C.F.R. § 204.5(l)(3)(ii)(A), the documents describe the Beneficiary's claimed experience. But the documents are not on the employer's stationery and indicate that the restaurant no longer employs the workers. The record lacks independent, corroborating evidence that they worked at the restaurant during the Beneficiary's tenure there.

Additionally, a business registration certificate dated in December 2004 regarding the restaurant states the document's "[r]eason for issuance" as "change in business type." Thus, the certificate appears to indicate that the restaurant began operating a different type of business in December 2004, casting doubt on whether the Beneficiary gained the required two years of qualifying experience in the job offered. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring at petitioner to resolve inconsistencies of record). The record at the time of the NOIR's issuance therefore did not establish the Beneficiary's possession of the minimum experience required for the offered position.

The NOIR did not notify the Petitioner of the additional derogatory information and evidentiary deficiencies. We will therefore remand the matter. *See* 8 C.F.R. § 103.2(b)(16)(i) (requiring USCIS to notify a petitioner of derogatory information of which it is unaware and to provide it with a rebuttal opportunity). On remand, the Director should issue a new NOIR informing the Petitioner of the derogatory information and the evidentiary deficiencies and allowing the company a reasonable chance to respond.[1]

V. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Acting Director, the record at the time of the NOIR's issuance also did not establish the Petitioner's required ability to pay the proffered wage. 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 income tax returns, or audited financial statements. *Id.*

The Petitioner's labor certification states the proffered wage of the offered position of specialty chef as $57,429 a year. As previously indicated, the petition's priority date is August 12, 2014.

The Petitioner submitted copies of its federal income tax return for 2014, the year of the petition's priority date. The record, however, lacks regulatory required evidence of the company's ability to pay the proffered wage in 2015. *See* 8 C.F.R. § 205.5(g)(2).

On remand, the new NOIR should instruct the Petitioner to provide copies of an annual report, federal tax return, or audited financial statements for 2015. The Petitioner may also submit additional

evidence of its ability to pay in 2015, including materials supporting the factors in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

VI. THE BENEFICIARY AS AN AFFECTED PARTY

In addition, the Director should determine whether USCIS should treat the Beneficiary on remand as an "affected party." As previously indicated, even after eligible beneficiaries change jobs or employers, approved petitions may remain valid under certain conditions. *See* section 204(j) of the Act. A beneficiary of a valid visa petition, whose application for adjustment of status remained pending for at least 180 days, may port the petition to a new job if it is in the same or similar occupational classification as the position offered in the petition. *Id.* "Beneficiaries of valid employment-based immigrant visa petitions who are eligible to change jobs or employers and who have properly requested to do so [under section 204(j)], are 'affected parties' under [Department of Homeland Security] regulations for purposes of revocation proceedings." *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 *1 (AAO Nov. 11, 2017).

The Beneficiary asked to port. The Director, however, did not determine his qualifications to port or whether he properly requested to do so. Thus, on remand, the Director should consider the Beneficiary's eligibility to port under section 204(j) of the Act. This determination involves considering whether the Beneficiary's adjustment application remained pending for at least 180 days as of the request to port. *See* 8 C.F.R. § 245.25(a)(2). It also involves considering whether USCIS received sufficient notice of the Beneficiary's new job offer and whether the job is in "the same or similar occupational classification" as the position offered in the petition. *Id.*

If the Director finds that the Beneficiary properly ported, the Director should issue a new NOIR to the Petitioner and Beneficiary. If the Beneficiary did not properly port, the Director should issue a new NOIR only to the Petitioner. Upon receipt of a timely response to a new NOIR, the Director should review the entire record and enter a new decision.

VII. CONCLUSION

The record as currently constituted does not support the Beneficiary's alleged misrepresentation of his qualifying experience or the Petitioner's purported lack of intent to employ him in the offered position. The company, however, did not establish its ability to pay the proffered wage in 2015, and the record contains additional derogatory evidence regarding the Beneficiary's qualifications for the position.

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