U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21302090

Date: JULY 8, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a stonemason 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). This category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status. The Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers, concluding that the Petitioner did not establish that the Beneficiary possessed the experience required for the position or the immigrant classification.

The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we conclude that a remand is warranted in this case.

I. LAW

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 DOL ETA Form 9089, Application for Permanent Employment Certification (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 noncitizen 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

The Beneficiary applied for a nonimmigrant visitor's visa in 2016. As the Director noted, the application for that visa requested the Beneficiary's work history for the previous five years in which he indicated he worked in the masonry industry from November of 2013 to January of 2014, and his present work was in the restaurant business. The Beneficiary entered the United States utilizing that nonimmigrant visa in the same year.

The Petitioner filed the labor certification in January of 2019. On that labor certification the employer indicated that the position required 24 months of experience. The labor certification also reflects the Beneficiary worked in the masonry industry for two employers; the first from February of 2007 to June of 2010 (Employer 1), and the second from July of 2010 to April of 2014 (Employer 2). The Petitioner filed the petition in October of 2019 supported in part by an experience letter noting the Beneficiary's work for Employer 1 from 2007 to 2010.

In August of 2020, the Director issued a notice of intent to deny (NOID) alleging that the Beneficiary's nonimmigrant visa application did not support his claims that he accumulated seven years of experience as a stone mason. The Director recognized three months of work in the masonry industry and noted inconsistencies between the Beneficiary's claimed work history and the information contained in his visa application. In addition to the Beneficiary's work in the masonry industry, the Director noted he was affiliated with an educational institution from 2007 to 2010 and listed the course of study as accounting sciences. Ultimately, the Director alleged that the Petitioner had failed to demonstrate the Beneficiary possessed the requisite 24 months of experience for the position.

Responding to the NOID, the Petitioner provided a letter from Employer 2, and an affidavit from the Beneficiary explaining his work and education history among other evidence. The Director conceded it was plausible why some of the work history was not included on the visa application since it only requested information relating to the most recent five years. But the Director concluded the Petitioner's response to the NOID did not provide a plausible explanation for the inconsistency between the nonimmigrant visa application and the labor certification as it relates to the dates of the Beneficiary's experience. In doing so, the Director stated it was the Petitioner's burden to resolve any inconsistencies in the record and that they had failed to provide independent and objective evidence to support their explanations for the date-related discrepancy.

The Petitioner appeals the Director's decision and provides a new affidavit from the Beneficiary, a second letter from Employer 2, and a timeline representing how his part-time university attendance at night could overlap with his daytime employment with Employer 1. After reviewing the Petitioner's claims and the evidence in the record, we conclude that the Petitioner has provided sufficient objective and independent documentation that resolves the concerns the Director expressed in the denial decision. Here, our conclusion relates only to the resolution of the discrepant information the Director raised in its denial notice.[1]

[1] On remand, the Director may wish to inquire whether the Beneficiary's foreign experience was full or part time in nature in accordance with the terms and conditions specified in the labor certification and the requested immigrant visa category. Additionally, the Director could inquire why Employer 1's experience letter submitted on appeal is in English but the first letter from that employer was in Portuguese and was accompanied by an English translation.

We will remand the matter to the Director for consideration of whether the Petitioner has satisfied the remaining statutory eligibility criteria under the third-preference, immigrant visa category for skilled workers.

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