U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11198696

Date: JUL. 12, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a store manager. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

After initially approving the petition, the Director of the Texas Service Center revoked the approval. The Director found that the Petitioner did not establish that it had the continuing ability to pay the proffered wage in accordance with the requirements in 8 C.F.R. § 204.5(g)(2), that the Beneficiary possessed the required two years of experience for the offered position, and that the job offer was *bona fide*. The Director dismissed two subsequent motions to reopen and reconsider filed by the Beneficiary.

At the time the appeal was filed the Petitioner no longer existed as a legal entity with standing to file an appeal. *See* 8 C.F.R. §103.3(a)(1)(iii)(B). The matter is now before us on the Beneficiary's appeal.

In these proceedings, it is the Appellant's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. BENEFICIARY AS AN AFFECTED PARTY

Beneficiaries generally cannot file appeals or motions in visa petition proceedings. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (excluding a beneficiary of a visa petition as an "affected party"). U. S. Citizenship and Immigration Services (USCIS), however, treats beneficiaries as affected parties if they are eligible to "port" under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly request to do so. *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06, *14 (AAO Nov. 11, 2017). "A beneficiary's request to port is 'proper' when USCIS has evaluated the request and determined that the beneficiary is indeed eligible to port prior to the issuance of a NOIR [notice of intent to revoke] or NOR [notice of revocation]." USCIS Policy Memorandum PM 602-0152, *Guidance on Notice to, and Standing for, AC 21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* 5 (Nov. 11,

2017), https://www.uscis.gov/legal-resources/policy-memoranda. Thus, a beneficiary becomes an "affected party" with legal standing in a revocation proceeding when USCIS makes a favorable determination that the beneficiary is eligible to port. *Id*.

II. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* 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*.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to USCIS. *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally 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, 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. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

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.[1] *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.*

In this case, the accompanying labor certification was filed on January 16, 2006.[2] The petition was initially filed on March 27, 2006, and approved on March 31, 2006. The Beneficiary filed Form I-485, Application to Register Permanent Residence or Adjust Status, on August 24, 2007. The record demonstrates that the Beneficiary was employed with the Petitioner until the end of 2007, and that the Petitioner's business was terminated on July 24, 2009. The Beneficiary filed Form I-

[1] USCIS will also send a NOIR or NOR to the beneficiary of a petition if: (A) the beneficiary has filed a Form I-485 with USCIS that has been pending for 180 days or more; and (B) the beneficiary is otherwise eligible to port and has properly requested to port. USCIS Policy Memorandum PM 602-0152, *supra*, at 5.

[2] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

485 Supplement J, Request for Job Portability Under INA Section 204(j), which was approved on July 31, 2018.[3] The Form I-485 Supplement J stated that the Beneficiary requested job portability to a new employer in the position of store manager.[4]

The Director's NOIR is dated July 29, 2019 and was mailed to the Petitioner and to counsel. Although the Petitioner's business was terminated on July 24, 2009, the Beneficiary appears to have received notice of the revocation proceedings through their mutual counsel and only the Beneficiary, through counsel, provided a response to the NOIR. While the Beneficiary has filed the two motions and the appeal, it appears that representatives of the former Petitioner have actively assisted the Beneficiary and his counsel in obtaining some of the requested evidence, including the Petitioner's tax returns, tax transcripts and the Petitioner's owner's personal tax returns. Therefore, in these proceedings we will continue to treat the Beneficiary as an affected party.

III. 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 include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS next examines whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[5]

As noted above, the priority date of the accompanying labor certification is January 16, 2006. The proffered wage of the offered position of store manager as $45,344 per year.

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[3] The instructions to Form I-485 Supplement J state that this form is used to:

1. Confirm that the job offered to you in Form I-140 remains a bona fide job offer that you intend to accept once we approve your Form I 485 is approved; or
2. Request job portability under INA section 204(j) to a new, full-time, permanent job offer that you intend to accept once your Form I-485 is approved. This new job offer must be in the same or a similar occupational classification as the job offered to you in Form I-140 that is the basis of your Form I-485.

See I-485 J, Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j), https://www.uscis.gov/sites/default/files/document/forms/i-485supjinstr-pc.pdf.

[4] The instructions for Form I-485 Supplement J also state "…the adjudication of Supplement J, for applicants requesting job portability under INA section 204(j), is primarily limited to a determination of whether you have a bona fide job offer from a U.S. employer that is in the same or a similar occupational classification as the position for which the underlying Form I-140 was filed and approved." *Id.*

[5] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

The Director issued the NOIR for good and sufficient cause. Contrary to 8 C.F.R. § 204.5(g)(2), the record as of the petition's approval in 2006 lacked required copies of the Petitioner's annual report, federal income tax returns, or audited financial statements from the petition's 2006 priority date onward. As of the NOIR's issuance, the record therefore did not establish the Petitioner's ability to pay the proffered wage and would have warranted its denial.

The record reflects that the Petitioner operated its business from 2000 until 2009. The Beneficiary's counsel asserts that the Petitioner paid taxes until 2007 and the business ceased to exist due to tax forfeiture on July 24, 2009.

Copies of Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, indicate that the Petitioner paid the Beneficiary $28,000 in 2006, and $19,600 in 2007, which is less than the proffered wage of $45,344 in both years. Therefore, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of January 16, 2006 based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage that year.

The record includes the Petitioner's IRS issued account transcripts for 2006 and 2007.[6] In this case, the Petitioner reported net taxable income below the proffered wage in 2006 and fairly minimal net taxable income in 2007, with no tax credits in either year.[7] The tax transcripts do not list net current assets and the Petitioner has not provided evidence of its net current assets in either year. Accordingly, the Petitioner has not established that it had sufficient net income or net current assets to pay the difference between proffered wage of $45,344 and wages already paid to the Beneficiary in 2006 or 2007.

On appeal, the Beneficiary submits copies of the Petitioner's shareholders' personal income tax returns. Because the Petitioner filed income taxes as an S corporation, the Beneficiary's counsel asserts that USCIS may consider the personal income of its shareholders in determining its ability to pay. S corporations allow shareholders to report company incomes on their individual tax returns, thereby avoiding "double taxation" on profits. 26 U.S.C. § 1366. But, unlike sole proprietors, S corporations remain separate entities from their shareholders. *Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530, 531 (Comm'r 1980). Thus, shareholders of S corporations have no personal obligations to pay proffered wages of the companies they own. *See Sitar Rest. v. Ashcroft*, No. Civ.A.02-30197-MAP, 2003 WL 22203713, *2 (D. Mass. Sept. 18, 2003) (holding that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or

[6] If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net taxable income (or loss). However, if there are relevant entries for additional tax credits, these will also be considered.

[7] Disclosures of a petitioner's non-public financial information, including specific figures on a petitioner's federal tax return, may be a violation of law and should not be disclosed to a beneficiary. USCIS Policy Memorandum PM 602-0152, *supra*, at 7.

entities who have no legal obligation to pay the wage"). We therefore will not consider the personal income of the Petitioner's sole shareholders in determining its ability to pay.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Here, the record indicates that, as of the petition's approval, the Petitioner had conducted business for about six years and employed four people. Unlike the petitioner in *Sonegawa*, however, the record does not indicate the Petitioner's incurrence of uncharacteristic expenses or losses, or its possession of an outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of an existing employee or outsourced service. Thus, under *Sonegawa*, a totality of the circumstances does not establish the Petitioner's ability to pay.

In accord with the foregoing analysis, we conclude that the Petitioner has not established its continuing ability to pay the proffered wage of $45,344 per year from the priority date of January 16, 2006 and we will dismiss the appeal.

IV. THE BENEFICIARY'S EXPERIENCE

The accompanying labor certification states that the offered position requires a high school, or foreign equivalent, degree and 24 months of experience in the offered job of store manager. Experience in an alternate occupation is not accepted. The labor certification also states that the position requires knowledge and experience in bookkeeping and accounting. On the labor certification, the Petitioner asserts that the Beneficiary earned a bachelor's degree in India in 1993, and that he gained experience as a store manager from May 1999 to July 2002 with [redacted] in India, and from October 1995 to December 1998 with [redacted] in India.

The initial evidence submitted with the petition included a letter from the owner of [redacted], indicating that the Beneficiary was employed as a store manager from May 1999 to July 2002, and a letter from the owner of [redacted] indicating that the Beneficiary was employed as a store manager from October 1995 to December 1998. Both letters state that the Beneficiary had knowledge of bookkeeping and accounting, but neither letter listed the Beneficiary's job duties as store manager.

In the NOIR, the Director noted this deficiency in the experience letters, as well as an inconsistency regarding the Beneficiary's claimed employment. The Director found that the record included the Beneficiary's Form G-325A, Biographic Information, which did not list any information for the Beneficiary's last occupation abroad.

In response to the NOIR, the Beneficiary submitted a second letter from the owner of [redacted] listing the Beneficiary's job duties as store manager. The Beneficiary's counsel also states that it did not list the Beneficiary's last occupation abroad on the Form G-325A, as this employment was more than five years prior to filing the form.

The Director concluded that the Beneficiary did not submit independent objective evidence to resolve the inconsistency in the claimed employment and the Form G-325A. The Director also found that the signature on the second letter from [redacted] was vastly different from the signature on the original experience letter signed by [redacted] and declined to accept the letter as credible evidence of the Beneficiary's experience.

With his motion to reopen and reconsider, the Beneficiary submitted a statement from [redacted] asserting that he modified his signature over time. He attests to the authenticity of his signature on the second experience letter, which matches the signature on the biographic page of his passport.

On appeal, the Beneficiary asserts that the Director's dismissal of [redacted] statement regarding his signature, combined with a copy of his signature from his passport for comparison, is an abuse of discretion. We disagree.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). A document may be found fraudulent without forensic analysis where the document contains obvious defects or identifiable indicators of fraud, and an opportunity to explain the defects has been provided. *See Matter O-M-O*, 28 I&N Dec. 191 (BIA 2021).

Here, the Beneficiary relies only on testimonial evidence from his former employer to establish his claimed employment experience, without providing independent, objective evidence in support of this testimony. Based on inconsistencies in the Beneficiary's Form G-325A, and discrepant signatures on the experience letters, further independent evidence is required. The record does not include the Beneficiary's income tax or payroll records to corroborate his claimed employment. Nor does the Beneficiary assert that these records are unavailable for any reason. The Beneficiary 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). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

As the inconsistencies in the record have not been resolved, the Beneficiary has not established with independent, objective evidence that he possesses the required 24 months of experience in the offered position, as required by the labor certification. The Beneficiary has not overcome this basis of the Director's revocation.

On appeal, the Beneficiary also asserts that he meets the 24 months of experience required by the labor certification based on his relevant post-secondary education. Citing to 8 C.F.R. § 204.5(l)(2), the Beneficiary states that "while post-secondary education is not required in order to qualify under the EB3 category as a 'skilled worker,' evidence of such education may be counted, so long as it is relevant, toward meeting the '2 years training or experience requirement.'"[8]

In defining a skilled worker, the regulation at 8 C.F.R. § 204.5(l)(2) states, "Relevant post-secondary education may be considered as training for the purposes of this provision." Contrary to the Beneficiary's assertion, while the regulation allows the consideration of education as training, the regulation does not allow a substitution of education for experience.

The Beneficiary has not established that he meets the requirements of the offered position as stated on the labor certification. When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983).

On the accompanying labor certification, the Petitioner checked "no" to question H.5, "Is training required in the job opportunity?" The Petitioner also checked "no" to question H.8, "Is there an alternate combination of education and experience that is acceptable?" USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). We cannot read or interpret the labor certification other than how it was certified. Here, the Petitioner could have allowed for training in lieu of experience, or for an alternate combination of education and experience to satisfy the experience requirement for the offered position, but it did not do so. Further, the labor certification states that experience in an occupation

[8] The record includes the Beneficiary's Bachelor of Commerce degree and certificate of marks issued by the University of [redacted] in 1993, and an evaluation of the Beneficiary's academic qualifications and experience from Morningside Evaluations. The evaluation concludes that the Beneficiary has attained the equivalent of at least a Bachelor of Business Administration degree from an accredited institution of higher education in the United States, based upon his completion of three years of academic coursework and more than three years of professional experience "as represented in letters from employers and a curriculum vitae." The record does not include copies of the letters from employers and curriculum vitae upon which the evaluator relied.

other than store manager is not accepted. The Beneficiary has not established that the labor certification would allow his Bachelor of Commerce degree to be equated to experience as a store manager.

A preponderance of evidence does not demonstrate the Beneficiary's possession of 24 months of experience required for the offered position as required by the labor certification and for the requested skilled worker classification. We will therefore dismiss the appeal on this basis.

V. BONA FIDE JOB OFFER

In the NOIR, the Director found that because the Beneficiary terminated his employment with the Petitioner in 2007 (before its official closure in 2009), and because the Beneficiary created and registered three different businesses from November 2006 to April 2012, it appeared that a *bona fide* job offer did not exist and the Beneficiary intended to pursue other employment opportunities. In his decision revoking the petition's approval, the Director concluded that the Petitioner did not establish that the Beneficiary intended to accept the offered position of store manager.

Because we have found that the Petitioner does not qualify for the requested benefit, we conclude that the petition, as filed, cannot be approved and we reserve on the issue of whether a *bona fide* job offer exists.

VI. CONCLUSION

For the reasons discussed above, as of the petition's approval, the record did not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward, or the Beneficiary's possession of the minimum experience for the offered position as required by the labor certification. The record establishes the petition's erroneous approval and we will therefore affirm the Director's decision to revoke its approval.

ORDER: The appeal is dismissed.