U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24553730

Date: JAN. 23, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as an Indian food specialty cook. 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, "EB-3" 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.

The Director of the Nebraska Service Center revoked the approval of the petition, concluding that the Petitioner did not establish that the Beneficiary possessed the minimum experience required for the offered position. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (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 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

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 U.S. Citizenship and Immigration Services (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.

A skilled worker must be capable of "performing skilled labor (requiring at least 2 years training or experience)." Section 203(b)(3)(A)(i) of the Act. 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).[1] 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 the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

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 notice of intent to revoke (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. ANALYSIS

The petition in this case was filed July 7, 2006. The accompanying labor certification indicates that the offered position requires 24 months of experience as an Indian food specialty cook. The job duties of the offered position described on the labor certification are as, "Prepares, seasons, and cooks various Indian food dishes using different types of vegetables, tandor [*sic*], and traditional ingredients and seasonings. Plans menus and coordinates with manager in determining food supply."

On the labor certification the Petitioner states that the Beneficiary was employed full-time as an Indian food cook with [redacted], in [redacted] India, from January 1, 2002 until August 1, 2004. The initial evidence included an undated letter from the general manager of [redacted] Hotels stating that the Beneficiary worked in the hotel as an Indian food cook from January 2002 to August 2004. The petition was approved on February 2, 2007.

In January 2022, the Director sent the Petitioner a NOIR, stating that new evidence provided to USCIS presented conflicting information with the petition. The Director noted that, during the Beneficiary's immigrant visa interview at the U.S. Consulate in New Delhi, India on July 20, 2018, he made statements that were inconsistent with the claims of his prior experience as a cook. The Director

[1] This petition's priority date is March 31, 2006, the date the 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).

stated, "The Beneficiary then signed a sworn statement that he is not a cook and that he began to learn how to cook after his petition became current."

The Petitioner provided a response to the NOIR. The response included a statement from the Beneficiary with an English translation, a copy of the letter from [redacted] Hotels already in the record, and a new letter of employment. The new letter is dated February 14, 2022, from the owner of [redacted] Catering in [redacted] India, stating that the Beneficiary has been working as a chef since October 2017.

In his statement, the Beneficiary describes his consular interview and asserts that he signed his statement under duress. He states that he told the consular officer that he was a "confectioner" and stated, "I don't know how to make sweets, I only know how to make vegetables." He also states that the consular officer advised him that people in his village claimed that he owned an auto mechanic shop. The Beneficiary states that he informed the consular officer that his father owns the mechanic shop, that it is rented to another individual, and that he does not work there or know how to perform auto mechanic work. He asserts that the statement he signed under duress stated only that he owned a workshop and rented it out. He denies signing any statement regarding his employment as a cook or when he learned how to cook.

The Director revoked the approval of the petition. In the decision, the Director referenced the same conflicting information presented at the Beneficiary's consular interview. The Director addressed the Petitioner's response to the NOIR by stating that it had been received and added to the record but did not provide further discussion or analysis.

On appeal the Petitioner notes that the Director did not discuss its response to the NOIR. It further states that neither the consular officer nor the Director questioned the Beneficiary's claimed experience with [redacted] Hotels and that his field of employment since the petition was filed is not relevant.

The Director's decision to revoke the petition's approval is deficient, as it does not sufficiently explain the reasons for revocation. When revoking approval of a petition, a director has an affirmative duty to explain the specific reasons for the revocation; this duty includes informing a petitioner why the evidence did not to satisfy its burden of proof pursuant to section 291 of the Act. *See* 8 C.F.R. § 103.3(a)(1)(i). The Director's decision in this case does not explain why the information provided in response to the NOIR was insufficient or how it failed to satisfy its burden of proof regarding eligibility for the benefit sought.

Although not mentioned in the NOIR or the Director's revocation, additional adverse information casts doubt on the Beneficiary's claimed employment experience. The labor certification states that the offered position of Indian food specialty cook requires 24 months of experience in the offered job and that experience in an alternate occupation is not accepted. Experience "in the job offered" means experience "performing the key duties of the job opportunity." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. at 4 (BALCA Oct. 24, 2011) (citations omitted). As noted above, the job duties listed on the labor certification are to prepare, season, and cook various Indian food dishes, and to *plan menus and coordinate with manager in determining food supply*. Therefore, experience in the job offered of cook must include the key job duties of planning menus and determining food supply.

In support of claimed qualifying experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must state the employer's name, title, and address, and "a description of . . . the experience of the alien." *Id.* If such a letter is unavailable, USCIS will consider other evidence of a beneficiary's experience. 8 C.F.R. § 204.5(g)(1). The letter from [redacted] Hotels does not list the Beneficiary's job duties in his position as Indian food cook. The record does not include evidence demonstrating that the Beneficiary possessed the 24 months of experience in all of the job duties of the offered position, including planning menus and determining food supply, as of the priority date and as required by the labor certification.

We note that the Beneficiary's claimed experience with [redacted] Catering does not demonstrate that he possesses the required 24 months of experience for the offered position. A petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Here, the Beneficiary's claimed experience with [redacted] Catering began in October 2017, more than 11 years after the labor certification was filed.

Considering the above discussed deficiencies, we are withdrawing the Director's revocation and remanding the petition to allow the Petitioner an opportunity to address the additional deficiencies identified above. On remand, the Director may wish to issue a new NOIR outlining the deficiencies above, and allowing the Petitioner an opportunity to respond. The Director must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme. If the Director makes a finding of willful material misrepresentation against either the Petitioner, the Beneficiary, or both, the Director must articulate the basis for the finding(s) in accordance with the above-referenced case law.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration. If the Director issues a new NOIR, 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.