U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26144402

Date: JUN. 15, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a limited partnership, operates an ice skating rink and seeks to permanently employ the Beneficiary as an "ice skating and hydroblading[1] coach." The partnership requests his classification under the third-preference, immigrant visa 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). This category allows a prospective U.S. employer to sponsor a noncitizen for lawful permanent residence to work in a job requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's qualifying training or experience for the offered position. On appeal, the Petitioner submits additional evidence of the Beneficiary's qualifications.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the Petitioner did not demonstrate the Beneficiary's qualifying experience for the offered job. We will therefore dismiss the appeal.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and permanent employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the

[1] The record describes hydroblading as a figure skating technique where a skater glides on a deep edge with their body stretched in a low horizontal position, almost touching the ice.

requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(B).

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.

II. ANALYSIS

A petitioner must demonstrate that a beneficiary met all DOL-certified job requirements of an offered position by a petition's priority date. 8 C.F.R. § 204.5(l)(3)((ii)(B); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is March 26, 2021, the date DOL accepted the Petitioner's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

When assessing a beneficiary's qualifications for an offered position, USCIS must examine the job-offer portion of an accompanying labor certification to determine the job's minimum requirements. The Agency may neither ignore a certification term nor impose an unstated requirement. *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 the minimum requirements of the offered coaching position as three years of training "in Hydroblading" and three years of employment experience as a "developer of competitive skaters, or coaching figure skaters." Also, part H.14 of the labor certification - "Specific skills or other requirements" - states that the required training and experience "may be gained simultaneously." The labor certification states that the position has no educational qualifications.

In part K of the labor certification, "Alien Work Experience," the Beneficiary attested that, by the petition's 2021 priority date, he worked more than three years as a developer of competitive skaters and ice skating instructor. He stated that - from March 1, 2013 to March 31, 2016 - a U.S. rink employed him in these roles for 10 hours a week.

Part K of a labor certification should list not only a noncitizen's qualifying experience but also any qualifying training, even if they did not receive payment for it.[2] DOL, Emp't & Training Admin., "OFLC [Office of Foreign Labor Certification] Frequently Asked Questions and Answers," PERM Program, Alien Experience, Q.7, www.foreignlaborcert.doleta.gov/faqsanswers.cfm. If qualifying training is indicated, part K should list training providers as "employers," "job title" should state "training," and "job details" should include relevant training activities, topics, or certifications. *Id.*

In part K of the Petitioner's labor certification, the Beneficiary did not specify his receipt of qualifying training. He attested to additional employment, stating his full-time work for the Petitioner as an ice skater from June 2009 to November 2020. But this position does not appear to constitute qualifying experience as a developer of competitive skaters or a figure skating coach.

[2] Unpaid experience or "under the table" experience - where a noncitizen is paid "off-the-books" - may also constitute qualifying experience. *Matter of B&B Residential Facility*, 2001-INA-146, *4 (BALCA Jul. 16, 2002).

To demonstrate claimed training and experience, a petitioner must submit letters from a beneficiary's trainers and employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must include the names, addresses, and titles of the trainers/employers, and descriptions of the beneficiary's training/experience. *Id.* "If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered." 8 C.F.R. § 204.5(g)(1).

The Petitioner's initial filing lacked letters from trainers or employers. The Director therefore mailed the Petitioner a request for additional evidence (RFE), asking for the regulatory required proof.

The Petitioner's RFE response included a letter from one of the Petitioner's owners, who developed the hydroblading technique. The letter states that the Beneficiary, a native and citizen of Russia, came to the U.S. in 2008 to train at the Petitioner's rink. He was half of an ice dancing couple that represented the United States in international competitions. The owner stated that she began to mentor the Beneficiary in hydroblading, and he continued this training until 2015. Although the Beneficiary primarily skated, the owner said that, through her mentoring, he became a "junior coach" and began teaching skaters in all the Petitioner's figure skating programs. He also coached skaters at the other U.S. ice rink. After the Beneficiary's ice dancing partner stopped performing, the owner stated that the Beneficiary became a "main coach" at the Petitioner's facility.

The owner said that she knows the other rink employed the Beneficiary as a figure skating coach from March 2013 through March 2016 because, during that period, she continued to train him in hydroblading. She said the Beneficiary worked 10 hours a week as a coach for the other rink and spent the remainder of his time training in hydroblading with her and coaching other skaters. The owner stated that, although the offered position requires at least three years of hydroblading training and three years of experience, the training and experience need not be full-time. She said that is why the Petitioner indicated its acceptance on the labor certification application of concurrent training and experience.

We agree with the Director that, contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner did not demonstrate the Beneficiary's claimed qualifying experience for the offered position. The labor certification does not state the Petitioner's acceptance of part-time experience. But even if it did, the regulation requires a letter from the Beneficiary's former "employer." *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The Petitioner has not established that it or its owner - as opposed to the other ice rink - employed the Beneficiary as a coach at that time. The Petitioner also did not establish the unavailability of a letter from the other rink. *See* 8 C.F.R. § 204.5(g)(1). The letter from the Petitioner's owner therefore does not demonstrate the Beneficiary's claimed qualifying experience.

On appeal, the Petitioner submits additional evidence of the Beneficiary's experience - including a letter from the other rink's assistant general manager. The Petitioner asserts that "the Beneficiary has experience and training that far exceeded what USCIS considers 'full time' during the requisite 36-month period."

But, if a petitioner received notice of required evidence and a reasonable opportunity to provide it before denial, we do not generally consider evidence on appeal. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). The Director's RFE notified the Petitioner of the evidence needed to demonstrate the Beneficiary's qualifying experience for the offered position. The RFE specifically requests

"letter(s) from current or former *employer*(s)" (emphasis added) and provides the Petitioner with a reasonable opportunity to respond. The Petitioner does not claim that a letter from the other rink was unavailable before the petition's denial. We therefore decline to consider the Petitioner's additional evidence on appeal.

Also, although the owner asserted the Petitioner's acceptance of less than full-time training and experience for the offered position in the RFE response, the appeal does not renew that argument. We therefore need not decide the issue and consider it to be "waived." *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009) (declining to address an argument that was not raised on appeal). Even if the Petitioner had continued to assert its acceptance of part-time experience, the argument would not cure the RFE response's omission of the regulatory required letter from the Beneficiary's former employer.

Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner did not demonstrate the Beneficiary's qualifying experience for the offered position. We will therefore affirm the petition's denial.

Our affirmance resolves the appeal. Thus, we need not review the Director's finding of insufficient evidence of the Beneficiary's qualifying training for the offered position. Rather, we will reserve that denial ground for consideration if and when needed. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("[A]gencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.")

III. CONCLUSION

The Petitioner did not demonstrate the Beneficiary's qualifying experience for the offered position.

ORDER: The appeal is dismissed.