U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19343000

Date: JUL. 20, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a merchandise coordinator under the second-preference (EB-2), immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center approved the petition, but later revoked it after serving a notice of intent to revoke (NOIR). Within the NOIR and revocation notice, the Director discussed the determinations made by the consular officer during the Beneficiary's interview at the U.S. Embassy in Moscow, Russia; specifically, that the Beneficiary was ineligible for the EB-2 classification as an advanced degree professional. The Director considered the Petitioner's response to the NOIR, but ultimately concluded in his revocation notice that the Petitioner had not established the Beneficiary's qualifications for the EB-2 visa classification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we will withdraw the decision of the Director. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national 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.

The term "advanced degree" is defined in the regulation at 8 C.F.R. § 204.5(k)(2) as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

The regulations at 8 C.F.R. § 204.5(k)(3)(i) state that a petition for an advanced degree professional must be accompanied by either:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, a beneficiary must meet all of the education, training, experience, and other requirements specified on the labor certification as of the petition's priority date.[1] *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

To be eligible for the classification it requests for the beneficiary, a petitioner must establish, among other things, that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

II. ANALYSIS

Upon review, we will remand the matter to the Director to determine whether the Petitioner has demonstrated that the Beneficiary qualifies for the EB-2 classification as an advanced degree professional, and whether she meets the specific requirements of the labor certification.[2]

[1] The priority date of the petition is the date the underlying labor certification was filed with the DOL. 8 C.F.R. § 204.5(d). In this case the priority date is April 6, 2017.

[2] The Petitioner submitted documentation to support the petition. While we may not discuss every document, we have reviewed and considered each one.

A. Member of the Professions Holding an Advanced Degree

Section H of the labor certification states that the minimum requirements for the job offered are a U.S. master's degree in fashion merchandising and retail management. The Petitioner also specified the special skills needed for the job: knowledge of Photoshop, website administration, and photographic maintenance. According to the labor certification, the Petitioner will not accept a foreign degree deemed to be equivalent to the specified U.S. master's degree, or a U.S. master's degree in an alternative field; nor will it accept a combination of education and work experience for entry into the position. Therefore, to meet the requirements of the instant labor certification, the Beneficiary *must* possess a U.S. master's degree in fashion merchandising and retail management and the aforementioned specialized skills. *See Matter of Wing's Tea House*, 16 I&N Dec. 158.

In the initial filing, the Petitioner provided a copy of the Beneficiary's diploma and college transcript from L- College located in New York, which shows that she obtained a master of professional studies degree in fashion merchandising and retail management in August 2014. The Petitioner also provided work experience letters to show that the Beneficiary possesses the requisite special skills required by the labor certification. The Director approved the petition in August 2017.

The Beneficiary appeared for an immigrant visa interview at the U.S. Embassy in Moscow in March 2018. According to U. S. Department of State (DOS) records, DOS refused to issue the immigrant visa. The consular officer indicated that the Beneficiary obtained a bachelor's degree in 2010 and concluded that based on the work experience letters that she provided, she did not possess five years of work experience as of her priority date in April 2017. Notably, the consular officer did not explain why the Beneficiary's U.S. master's degree was insufficient to show eligibility for the EB-2 classification. DOS returned the petition to USCIS for possible revocation.

The Director issued a NOIR in November 2020, acknowledging that the record contained evidence of the Beneficiary's 2010 degree in journalism from M- University in [redacted] Russia, her 2013 bachelor's degree in fashion from L-C- University in the United Kingdom, and her 2014 U.S. master's degree. The Director indicated that the work experience letters did not show that "she possessed five years of post-baccalaureate experience." In response to the Director's NOIR, the Petitioner pointed to the specific U.S. master's degree and specialized skills requirements that were "submitted and approved in the labor certification." The Petitioner maintained that the Beneficiary possessed the requisite special skills knowledge and the U.S. master's degree and provided additional evidence about her foreign degrees.

In April 2021, the Director revoked the petition after reviewing the Petitioner's response to the NOIR, determining that the Beneficiary's master's degree was insufficient to establish the Beneficiary's qualifications for the position offered. The Director indicated that since the Beneficiary's master's degree program only encompassed a year and a half of coursework, and her bachelor's degree from L-C- University was only a three-year program of study, the two degrees combined were "short of the equivalent of a U.S. master's degree of six years." The Director also determined that the Beneficiary did not possess the equivalent of a U.S. bachelor's degree, followed by five years of post-baccalaureate progressive work experience; concluding that she did not qualify for the EB-2 classification under 8 C.F.R. § 204.5(k)(3)(i)(B). While the Director acknowledged the submission of the Beneficiary's 2010 degree in journalism, he provided no analysis of this credential in his revocation notice.

Based on our *de novo* review, we note that beyond establishing eligibility for the EB-2 classification, the Petitioner must show that the Beneficiary meets the specific qualifications on the labor certification: the U.S. master's degree in the specified field and the special skills. Therefore, the Beneficiary *may not* meet the labor certification requirements through a combination of education and work experience. The Director erred in his analysis within the revocation notice in this regard.

Additionally, for EB-2 qualification purposes an "*advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate." 8 C.F.R. § 204.5(k)(2). There is no statutory, regulatory, or USCIS policy requirement that a master's degree is only acceptable to establish eligibility for this classification if the person's U.S. bachelor's and master's degree programs (or foreign equivalent degrees) collectively encompass a six-year program of study. Accordingly, we withdraw the Director's revocation decision.

On appeal, the Petitioner submits relevant evidence addressing the Beneficiary's education credentials, to include a credentials evaluation of the Beneficiary's 2010 degree in journalism, as well as a letter from L- College in New York which discusses the college's accreditation by the Middle States Commission on Higher Education for the master's degree program. Thus, we will remand the matter to the Director to consider this evidence in the first instance, as well as the previously submitted evidence, to determine whether the Petitioner has demonstrated that the Beneficiary qualifies for the EB-2 classification as an advanced degree professional, and whether she meets the specific requirements of the labor certification.

B. Ability to Pay

Although not discussed by the Director, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage of $89,960 per year, from the priority date in April 2017, onward. The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The record does not contain the Petitioner's ability to pay for 2017. Without this evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

Therefore, we will also remand the matter to the Director to analyze the record and determine whether the Petitioner has established its ability to pay the proffered wage to the Beneficiary from the priority date onward. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

III. CONCLUSION

Considering the above discussed deficiencies, we are withdrawing the Director's revocation and remanding the petition to allow the Petitioner an opportunity to address them. On remand, the Director may wish to issue a new NOIR outlining aspects of the evidence in the record that he deems deficient and allowing the Petitioner an opportunity to respond. The Director should consider the entire record, including any new evidence submitted and, if deficient, must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme.

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.