U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24355506

Date: SEP. 1, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a provider of management services, seeks to permanently employ the Beneficiary as a management analyst. The company requests his classification under the second-preference, immigrant visa category for members of the professions holding an advanced degree or its equivalent. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After initially granting the filing, the Director of the Texas Service revoked the petition's approval. The Director concluded that the Petitioner did not demonstrate: 1) its intent to employ the Beneficiary in the offered position; 2) its required ability to pay the position's proffered wage; or 3) the Beneficiary's possession of the minimum employment experience required for the position and the requested immigrant visa category. The Director also found that, on the accompanying certification from the U.S. Department of Labor (DOL), the Beneficiary willfully misrepresented his qualifying experience.

We rejected the Petitioner's appeal as untimely. *See In re: 1857280* (AAO Jan. 27, 2022). In following joint motions to reopen and reconsider, however, the company provided additional evidence demonstrating the appeal's timeliness. As we rejected rather than decided the Petitioner's appeal, we lack jurisdiction over the company's motions challenging the rejection. *See* 8 C.F.R. § 103.5(a)(1)(i). Accordingly, we dismissed the motions, *see In re: 22047197* (AAO Sep. 1, 2022), and hereby reopen the Petitioner's appeal as timely filed.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (discussing the burden of proof in petition revocation proceedings); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we find that the evidence as currently constituted does not support the Director's revocations regarding the Petitioner's intent to employ the Beneficiary in the offered position, the company's ability to pay the proffered wage, or the Beneficiary's alleged misrepresentation. The company, however, has not demonstrated the Beneficiary's qualifying experience for the position or the requested immigrant visa category, in part for reasons that the Director did not specify. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. First, a prospective employer must apply to DOL for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't 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 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 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.

"[A]t any time" before a beneficiary obtains lawful permanent residence, 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 a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a NOIR response does not overcome revocation grounds stated in the notice, USCIS properly revokes a petition's approval. *Id.* at 451-52.

II. INTENT TO EMPLOY IN THE OFFERED POSITION

A business may file an immigrant visa petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions stated in an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to requirements on an accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis).

The Petitioner's petition and accompanying labor certification state the company's intent to permanently employ the Beneficiary in the full-time position of management analyst. The Director's June 2017 NOIR, however, cited online, state government information indicating the Petitioner's forfeiture of its corporate status. Because the reported forfeiture cast doubt on the company's continued operations, the NOIR alleged that the Petitioner did not demonstrate a continued intent to employ the Beneficiary in the offered position.

The Petitioner's NOIR response included updated state government information indicating the company's status as a legal corporation and copies of its federal income tax return for 2015. The record also contains copies of the company's federal and state quarterly payroll tax returns for 2015 and thereafter. Thus, a preponderance of evidence establishes that, at the time of the petition's

approval, the Petitioner conducted business and intended to employ the Beneficiary in the offered position. We will therefore withdraw the Director's revocation on this ground.

III. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, 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 generally 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 beginning with the year of a petition's priority date. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. If net income or 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).[1]

The labor certification states the proffered wage of the offered position of management analyst as $81,890 a year. The petition's priority date is February 5, 2015, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner filed the petition in November 2015, and USCIS approved it the same month. Thus, at the time of the petition's approval, the Petitioner had to demonstrate its ability to pay the proffered wage in 2015.

At the time of the petition's filing, regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2015 was not yet available. As previously indicated, however, the Petitioner's NOIR response included copies of its 2015 federal income tax return. The return reflects a net income amount exceeding the annual proffered wage of $81,890. Additionally, the record contains copies of the Petitioner's 2016 federal income tax return, which also reflects sufficient net income to pay the proffered wage that year.

The Petitioner sufficiently demonstrated its ability to pay the proffered wage of the offered position. We will therefore also withdraw this revocation ground.

IV. THE BENEFICIARY'S QUALIFYING EXPERIENCE

Advanced degree professionals must have "advanced degrees or their equivalent." Section 203(b)(2)(A) of the Act. The term "advanced degree" means:

[1] Federal courts have upheld USCIS' 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); *Rivzi 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).

> 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.

8 C.F.R. § 204.5(k)(2).

A petitioner must also demonstrate 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). As previously indicated, this petition's priority date is February 5, 2015.

In assessing 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 unlisted requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the burden of setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states the primary job requirements of the offered position of management analyst as a U.S. master's degree or a foreign equivalent degree in business administration, with neither training nor experience needed. The certification also states the Petitioner's acceptance of an alternate combination of education and experience: a bachelor's degree followed by five years of progressive experience in the management analysis field. The Petitioner seeks to qualify the Beneficiary for both the offered position and the requested immigrant visa category based on his claimed possession of a bachelor's degree and five years (60 months) of full-time, progressive, post-baccalaureate experience. The Beneficiary's educational qualifications are not at issue.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than nine years of full-time, qualifying experience as a management analyst. He stated that he worked about 46 months for [redacted] in the United States, from April 2011 until this petition's priority date of February 5, 2015, and claimed he previously worked about 56 months for another U.S. company, [redacted] from May 2005 through January 2010. The Beneficiary also stated that a Pakistani company, [redacted] employed him for about 14 months, from June 2000 to August 2001.

To support claimed, qualifying experience, a petitioner must submit letters from a beneficiary's current or former employers. 8 C.F.R. § 204.5(g)(1). The letters must contain the writers' names, titles, and addresses, and descriptions of the beneficiary's experience. *Id.*

The record demonstrates the Beneficiary's qualifying experience at [redacted] The Petitioner submitted a 2015 letter from a manager confirming the Beneficiary's attestation on the labor certification. The Director found that the record lacked evidence that [redacted] employed the manager. But we note that [redacted] 2011 Form I-140 petition for the Beneficiary bears the manager's signature. Additionally, copies of U.S. Internal Revenue Service (IRS) transcripts in

another filing for the Beneficiary confirm his employment by [redacted] from 2011 to 2015. We therefore find that a preponderance of evidence establishes the letter's validity and the Beneficiary's 46 months of qualifying experience at [redacted]

Regarding the Beneficiary's claimed qualifying work at [redacted] in Pakistan, the record does not establish the required post-baccalaureate nature of the experience. In response to the Director's NOIR, the Petitioner submitted a verified copy of the Beneficiary's foreign equivalent of a U.S. bachelor's degree, stating its issuance on August 20, 2001. The Beneficiary claimed that he began employment at [redacted] in June 2000 and last worked for the company on August 16, 2001. Thus, the record does not establish his experience in Pakistan as post-baccalaureate in nature. The record therefore does not establish the Beneficiary's qualifying experience from June 2000 to August 2001.

The Director found various discrepancies in the Beneficiary's claimed work history at [redacted] from May 2005 to January 2010. A prior Form I-140 petition for him included a labor certification and employment letters indicating that he did not begin employment at [redacted] until October 2006 and that he worked for another U.S. employer, [redacted] as an "internal auditor" from May 2005 to May 2006. Our review discloses another potential evidentiary discrepancy: copies of two versions of the Beneficiary's IRS Form W-2, Wage and Tax Statement, from [redacted] for 2009. One Form W-2 states that in 2009 [redacted] paid the Beneficiary $31,076. The other indicates the purported former employer's total payment to the Beneficiary that year of $23,424.50. Also, although the forms list the same federal employer identification number for [redacted] and the same U.S. Social Security number for the Beneficiary, they contain different addresses for him and the employer. The discrepant 2009 Forms W-2 cast doubt on the accuracy and authenticity of all the evidence of the Beneficiary's claimed qualifying experience with [redacted] *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of remaining evidence).

The Director did not notify the Petitioner of this additional, evidentiary deficiency. Also, on appeal, the company submits additional evidence seeking to explain inconsistencies in the Beneficiary's work history. We will therefore withdraw the Director's decision and remand the matter. On remand, the Director should review the Petitioner's new evidence. If necessary, the Director should issue a new NOIR explaining why the record does not establish the Beneficiary's qualifying experience for the offered position or the requested immigrant visa classification.

If supported by the record, a new NOIR may include any additional, potential revocation grounds. The Director, however, must afford the Petitioner a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and issue a new decision.

V. MISREPRESENTATION

USCIS can only approve a filing if "the facts stated in the petition are true." Section 204(b) of the Act. A petition incorporates any supporting evidence - including a labor certification. 8 C.F.R. § 103.2(b)(1). Thus, USCIS cannot approve a petition if the facts stated on an accompanying labor certification are untrue.

The Director concluded that the Beneficiary willfully misrepresented all his claimed qualifying experience on the accompanying labor certification. The Director reasoned that the record did not support the Beneficiary's claimed experience.

The record as currently constituted, however, does not support revocation of the petition's approval based on the Beneficiary's alleged misrepresentation. As previously discussed, the record contains additional evidence regarding inconsistencies of record that the Director has not yet reviewed. We will therefore withdraw this revocation ground.

VI. CONCLUSION

As currently constituted, the record does not support the Director's revocation of the petition based on the Petitioner's intent to employ the Beneficiary in the offered position, the company's ability to pay the proffered wage, or the Beneficiary's alleged misrepresentation of his qualifying experience. The Petitioner, however, has not demonstrated the Beneficiary's possession of the minimum experience required for the position or the requested immigrant visa category and should have an opportunity to address newly noticed derogatory information in the record.

ORDER: The decisions of the Administrative Appeals Office and the Director are withdrawn. The matter is remanded to the Director of the Texas Service Center for entry of a new decision consistent with the foregoing analysis.