U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19828674

Date: JUL. 25, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a restaurant, seeks to employ the Beneficiary as a gauchos meat server. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(B)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent residence a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Nebraska Service Center initially approved the petition. However, the Director subsequently revoked the approval based on a determination that the Petitioner did not demonstrate the Beneficiary's requisite experience to meet the requirements of the labor certification and to qualify for classification as an "other worker."

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* 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 and remand the matter to the Director.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). 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 domestic 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.

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) (providing that "[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").

II. ANALYSIS

The issue on appeal is whether the Beneficiary had the required 12-month job experience at the time of the filing of the labor certification. A petition for unskilled "other worker" classification must be accompanied by evidence that the beneficiary meets any educational, training, experience, or other requirements of the labor certification. 8 C.F.R. § 204.5(l)(3)(ii)(D). Further, any requirements of training or experience "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." 8 C.F.R. § 204.5(l)(3)(ii)(A). All requirements must be met by the petition's priority date. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

The labor certification in this case does not require any education or training to qualify for the job of gauchos meat server but does require at least 12 months of experience. In addition, the labor certification indicates that the individual "[m]ust have one year in Restaurant Food Handling and Customer Service Experience."

The labor certification claims that the Beneficiary met the 12-month experience requirement for the proffered position based on his four previous jobs in Brazil:

- [redacted] co-owner/guest relations, January 2015 – September 2015;
- [redacted] co-owner/guest relations, November 2014 – September 2015;
- [redacted] co-owner/server, November 2013 – November 2014; and
- [redacted] meat carver/meat server, July 2007 – March 2010.

In support of the petition, the Petitioner submitted a letter from [redacted] wait-staff manager at [redacted] who indicated that the Beneficiary was employed at the restaurant from July 2007 to March 2010 and described the job responsibilities. Based on the evidence in the record, the Director approved the petition.

However, in reviewing the record, the Director concluded that discrepancies between answers on the Beneficiary's nonimmigrant visa (NIV) application and the labor certification did not establish his required 12-month job experience. As relevant here, in the NOIR, the Director informed the Petitioner that while the Beneficiary indicated on his NIV application that his employer was [redacted], he also stated "no other previous employment." As such, the Director determined that the Beneficiary did not have the required 12-month job experience since, according to the NIV application, he was only employed at [redacted] from January 2015 – September 2015.

In revoking the approval of the petition, the Director acknowledged the Petitioner's argument that the NIV application only asked for the past five years but determined that since the employment at [redacted] and [redacted] occurred within the five years, the Beneficiary's employment experience was misrepresented. Further, the Director found that the Beneficiary did not have the required 12-month job experience. In addition, the Director indicated that since the Beneficiary's employment at [redacted] and [redacted] overlapped each other by approximately nine months and located in different cities, "USCIS is not convinced that [the] [B]eneficiary's previous employment is bona fide due to the substantial distance." On appeal, the Petitioner claims that the Beneficiary's omission of his previous two jobs is immaterial since he qualifies for the job experience requirement based on his oldest job [redacted]

The issue here is whether the Beneficiary had the required 12-month job experience at the time of the filing of the labor certification. As discussed above, the Director determined that the Petitioner did not show the Beneficiary's employment experience with [redacted] and [redacted] due to his omission on his NIV application, and the Beneficiary's most recent employment with [redacted] reflected approximately nine months of experience. Although the Petitioner contends the materiality of the Beneficiary's omission, none of the Beneficiary's experience with these employers would have qualified because the Petitioner did not provide the required experience letters. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) and (D). Similarly, while the Petitioner submits a screenshot from Google relating to the distance and time between [redacted] and [redacted] we need not address the reasonableness of working two concurrent jobs since the record does not contain the required experience letters.

Notwithstanding the above, we will remand this case to the Director to consider the employment claims with [redacted] and the job experience letter from [redacted] Although the Director acknowledged the submission of [redacted] letter and that the Beneficiary's employment with [redacted] occurred outside of the five-year NIV application period, the Director did not explain why the evidence or employment did not qualify the Beneficiary for the required 12-month job experience. In addition, the Director should also consider the Beneficiary's "Work Card" relating to his employment with [redacted] submitted in response to the NOIR.

ORDER: The Director's decision is withdrawn. The matter is remanded for further proceedings consistent with the foregoing analysis and for the entry of a new decision.