U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8205707

Date: JUN. 17, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner arranges tours of the [redacted] area for Japanese visitors and seeks to employ the Beneficiary as a travel agent. The company requests her classification under the third-preference, immigrant visa category for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Texas Service Center denied the petition. The Director concluded that, contrary to the Act and regulations, the Petitioner did not demonstrate the availability of the offered position to U.S. workers or the company's intent to employ the Beneficiary on a permanent basis.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010 (discussing the standard of proof). 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

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) employment of a noncitizen in the position will not 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 a 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 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. THE DENIAL GROUNDS

The Director concluded that the Petitioner did not demonstrate the *bona fides* of its "job offer" to the Beneficiary. The decision, however, indicates that the Director conflated two separate potential grounds of denial: 1) the *bona fides* of the job offer; and 2) the *bona fides* of the job opportunity. To avoid confusion, we will discuss the grounds separately.

A. The *Bona Fides* of the Job Opportunity

An employer must attest on a labor certification application that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8).

> If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers.

20 C.F.R. § 656.17(l). On the Form I-140 and accompanying labor certification, the Petitioner stated its employment of three people. That figure indicates a "small number of employees," and thus, under 20 C.F.R. § 656.17(l), the business had to be ready to demonstrate the *bona fides* of the job opportunity.

In a written request for evidence (RFE) to the Petitioner, the Director noted the company's employment of the Beneficiary in another position before the filing of the labor certification application. Also before the application's filing, the Director noted that a U.S. college issued Forms I-20, Certificates of Eligibility for Nonimmigrant Student Status, to the Beneficiary. *See* 8 C.F.R. § 214.2(f)(1)(A) (discussing procedures for the admission of foreign students into the United States). The forms indicate that the Petitioner's owner/chief executive officer (CEO) paid $28,000 towards the Beneficiary's continuing U.S. studies. Based on this pre-existing, financial relationship between the Beneficiary and the Petitioner's principal, the Director questioned the availability of the offered position to U.S. workers.

USCIS must examine a job opportunity to evaluate the merits of a petition by an employer "desiring and intending to employ" a foreign worker. *See* section 204(a)(1)(F) of the Act. USCIS must ensure that the facts of the labor certification are true - that there are insufficient workers able, willing, qualified, and available whose employment will not adversely affect the wages and working conditions of similarly employed U.S. workers. *See* sections 204(b), 212(a)(5)(A)(i) of the Act. Additionally, DOL's labor certification regulations at 20 C.F.R. §§ 656.3, 656.10(c)(8) require an employer, when asked, to show that a *bona fide* job opportunity is available to U.S. workers. *See also Matter of Amger Corp.*, 87-INA-545, slip op. at *2 (BALCA 1987) (*en banc*) (citing *Pasadena Typewriter & Adding Mach. Co., Inc. v. Dep't of Labor*, Case No. CV-83-5516-AAH(T) (C.D. Cal. Mar. 26, 1984); *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992) (*citing* INA, Legislative History, H.R. Rep. No. 1365 Cong., 2d Sess.).

The Petitioner's RFE response contained documentation of the company's U.S. recruitment efforts for the offered position during the labor certification process, including a recruitment report stating that no applicants applied for the job. In his decision, the Director noted that the Petitioner offered the position to the Beneficiary in November 2017, before the company began labor certification recruitment for the job in 2018. Thus, the Director found the position unavailable to U.S. workers. He stated that "the petitioner already planned to employ the beneficiary [in the offered job] and did not make a good-faith recruitment effort to hire a U.S. worker before the position was advertised."

But DOL regulations do not require labor certification employers to wait until completions of U.S. recruitment efforts before offering permanent positions to noncitizens. *See* 20 C.F.R. § 656.17. If qualified, willing, able, and available U.S. workers apply for offered positions, noncitizens may not fill those jobs. But nothing prevents employers from offering permanent positions to noncitizens before testing the U.S. labor market for labor certification purposes. Also, despite the Petitioner's pre-recruitment job offer to the Beneficiary, the company's recruitment results indicate the absence of qualified, willing, able, and available U.S. workers for the offered position. Noting that the position requires the ability to speak Japanese, the Petitioner's owner/CEO stated that "it is almost impossible to locate a qualified domestic worker with Japanese language skills." Thus, we do not find the timing of the Petitioner's job offer to the Beneficiary, alone, sufficient to support the alleged unavailability of the position to U.S. workers. We will therefore withdraw the Director's finding regarding the *bona fides* of the job opportunity.[1]

B. The *Bona Fides* of the Job Offer

As previously indicated, a business may file an immigrant 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 of 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 the terms of the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis).

A labor certification application must represent an offer of "[p]ermanent, full-time work." 20 C.F.R. § 656.3 (defining the term "employment"). Similarly, the requested immigrant visa classification of skilled worker requires the performance of "skilled labor (requiring at least 2 years training or experience), *not of a temporary or seasonal nature*." Section 203(b)(3)(A)(i) of the Act (emphasis added). Thus, consistent with the Act and the accompanying labor certification, the Petitioner must intend to employ the Beneficiary in the offered position of travel agent on a full-time, permanent basis.

Responding to the Director's RFE, the Petitioner's owner/CEO disclosed that, after the company's temporary employment of the Beneficiary in another position before the filing of the labor certification application, the owner/CEO entered into an oral agreement with the Beneficiary. He stated that he agreed to fund her continuing U.S. studies in exchange for her promise to work for the company in the

[1] A labor certification employer generally cannot rely on a noncitizen's training or education if the employer funded it. 20 C.F.R. § 656.17(i)(4). The offered position requires an associate degree. *See* 8 C.F.R. § 204.5(l)(2) (defining the term "skilled worker" to allow relevant, post-secondary education to serve as training). Evidence, however, shows that the Beneficiary obtained the requisite degree before the Petitioner's CEO/owner began paying her educational expenses. The record therefore does not establish the Petitioner's funding of the Beneficiary's qualifying education.

offered position if she obtains USCIS permission. The CEO/owner stated that, if the Beneficiary does not work in the position or terminates her employment in the position within three years of her start date, she agreed to reimburse the owner/CEO for the educational funding.

An offer of permanent employment on a labor certification application must propose "indefinite employment of a lasting and continuous nature." *Matter of Albert Einstein Med. Ctr.*, 2009-PER-00379, slip op. at *72 (BALCA Nov. 21, 2011) (*en banc*). "[A]n employer that has no intention to continue the employment beyond a set term of years cannot have the requisite intent." *Id.* The Director found that the agreement between the Beneficiary and the Petitioner's owner/CEO capped the term of the offered position at three years. The Director therefore concluded that the company did not demonstrate its intent to employ the Beneficiary on the requisite, permanent basis. The Director's decision states: "A job offer with a limited term of employment may not be a permanent, *bona fide* job opportunity."

The immigration service may deny an immigrant visa petition offering mere, temporary employment. *See Black Constr. Corp. v INS*, 746 F.2 503, 504 (9th Cir. 1984) (holding that the immigration service properly found jobs offered in immigrant visa petitions to be impermanent). The record, however, does not support the Director's finding that the Beneficiary would stop working for the Petitioner in the offered position after three years. The Petitioner's owner/CEO indicated that the Beneficiary could work in the position indefinitely. He stated: "I arranged [] financial support for [the Beneficiary's] schooling in return [for] her commitment of future employment for *at least* three (3) years." (emphasis added). Thus, the statements of the owner/CEO indicate that the agreement does not terminate the Beneficiary's employment in the offered position after three years. Rather, his statements indicate that the pact encourages her to work for the Petitioner for at least that long.

Based solely on the oral agreement's description by the Petitioner's CEO/owner, the record indicates that the offered position includes an indefinite term of employment. But the record lacks evidence of the Beneficiary's interpretation of the pact. If she believes that she promised to work for the Petitioner in the offered position for only three years, or if she intends to work in the position for only that period, then the record would not demonstrate the required, permanent nature of the job offer. We will therefore remand the matter.

On remand, the Director should ask the Petitioner to submit additional proof of the offered position's term of employment, including evidence of the Beneficiary's interpretation of her purported agreement with the Petitioner's CEO/owner.

If supported by the record, the Director may inform the Petitioner of any additional, potential grounds of denial. The Director, however, must afford the company 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 enter a new decision.

III. CONCLUSION

The record does not support the petition's denial based on the alleged unavailability of the offered position to U.S. workers. To establish the permanent nature of the offered position, however, the Petitioner must submit additional evidence of the job's term of employment.

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