U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22679100

Date: SEP. 14, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional Worker

The Petitioner, an electronic services and parts business, seeks to employ the Beneficiary as a human resources specialist. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The petition was initially approved. However, the Director of the Texas Service Center subsequently revoked the approval on the ground that the record did not establish the existence of a bona fide job offer open to qualified U.S. workers, or that the Petitioner intended to employ the Beneficiary in the proffered position.

On appeal, the Petitioner contests the Director's findings, asserting that the Director misconstrued the facts and misapplied the law.

The AAO reviews the questions in this matter de novo. See Matter of Christo 's Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015). It is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. 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 determine that the Petitioner has established, by a preponderance of the evidence, that the proffered position was a bona fide job opportunity open to U.S. workers and that applicable regulations were not violated in the labor certification process. Accordingly, we will withdraw the Director's decision. We will remand the case for adjudication within the statutory and regulatory framework for 1-140 immigrant visa petitions.

## I. LAW

Employment-based immigration generally follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. Id. Labor certification also indicates that the

employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id. Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5.[1] Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. 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 "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). Per Matter of Estime, "[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." Id.

## II. ANALYSIS

The petition was filed with USCIS on October 18, 2016, accompanied by a labor certification that was filed with the DOL on May 18, 2016, and certified on July 27, 2016. The petition was approved on December 28, 2016. However, on February 11, 2020, the Director issued a notice of intent to revoke (NOIR) the approval, pointing to information revealed during the Beneficiary's consular interview with the U.S. Department of State.

In the NOIR, the Director explained that during the consular interview, the Beneficiary stated under oath that she learned of the position from a job posting on a South Korea website, and the Petitioner offered the job to her in June 2015. The Director stated that since the Petitioner offered the job to the Beneficiary prior to advertising the position in the U.S., which was initiated in December 2015, the information on the labor certification was not true and correct. In reply to the NOIR, the Petitioner submitted affidavits from its president and the Beneficiary, as well as recruitment documents. While the Petitioner's president and the Beneficiary confirmed meeting one another for an interview prior to the U.S. recruitment process, they indicate that a formal job offer was made after the Petitioner completed the U.S. recruitment process. The Petitioner's president also attested to the job opportunity

[1] These requirements must be satisfied by the priority date of the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2), Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d). In this case, the priority date is May 18, 2016.

being open to any U.S. worker, as the Petitioner complied with the labor certification recruitment requirement advertising and the recruitment did not yield any U.S. candidates.

In the revocation decision, the Director reiterated the points raised in the NOIR. The Director found that since the job had already been offered to the Beneficiary prior to advertising in the U.S., the Petitioner did not comply with the labor certification's attestation that the job was a bona fide job opportunity clearly open to any U.S. worker.

With respect to the basis for the Director's decision, the Petitioner's assertions on appeal are persuasive. The Petitioner must prove eligibility by a preponderance of evidence, such that the applicant's claim is "probably true" based on the factual circumstances of each individual case. Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010); See Matter of E-M-, 20 I&N Dec. 77, 79-80 (Comm'r 1989). We find that the Petitioner has met that burden with respect to the Director's findings. Accordingly, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

A. Bona Fides of Job Opportunity

A petition may be approved only after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b). USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. See section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 103.2(b)(i).

In section N of the labor certification (Employer Declaration), the Petitioner certified 10 conditions of employment for the proffered position of human resource specialist, one of which was: "The job opportunity has been and is clearly open to any U.S. worker." This certification, accorded with the regulation at 20 C.F.R. § 656.10(c)(8), requires an employer to attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). The petitioner has the burden of establishing that a bona fide job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. See Matter of Amger Corp., 87-INA-545 (BALCA 1987); see also 8 U.S.C. § 1361.

In denying the petition, the Director stated that:

> the [P]etitioner does not dispute offering the [B]eneficiary the position of [h]uman [r]esource [s]pecialist before the job was advertised in the United States to U.S. workers. This confirms that the [B]eneficiary's position was never really open to qualified U.S. workers because the position had previously been offered to the [B]eneficiary in June 2015, although the [P]etitioner stated on the ETA 9089 form recruitment for the position took place in December 2015. The certifying officer for the labor certificate was unable to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons.

The Director further states that "[i]t appears that the [P]etitioner intends to employ the [B]eneficiary outside the terms of the labor certification. Therefore, the evidence does not show that the [P]etitioner made a bona fide job offer to the [B]eneficiary, or that the [P]etitioner desires and intends to employ the [B]eneficiary in the offered position."

The Director based the decision on evidence in the record, including sworn statements from the Petitioner's president and the Beneficiary, and recruitment materials submitted with the NOIR reply. The Director found an issue with the Petitioner's president and the Beneficiary having met in June 2015, prior to the U.S. recruitment process that started in December 2015. However, the Director's decision misconstrued the Petitioner's president's statement. The Petitioner's president's statement, as well as the Beneficiary's statement do not indicate the Petitioner offered the position to the Beneficiary in June 2015, but instead indicate that in June 2015 the Petitioner's president expressed an interest in hiring the Beneficiary and the Beneficiary could potentially be offered the position after completing job recruitment in the United States. The meeting between the Petitioner's president and the Beneficiary prior to a U.S. recruitment process documented in the labor certification does not necessarily demonstrate that the job was not a bona fide job opportunity clearly open to U.S. workers.

In the decision, the Director noted the Petitioner's submission of recruitment documentation with the NOIR reply; however, the Director did not analyze the recruitment documents in the decision. The record does not show inconsistencies or anomalies in the recruitment process.

We therefore withdraw the Director's finding on this issue.

B. Ability to Pay

Although not addressed in the Director's decision, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the priority date of the petition onward. 8 C.F.R. § 204.5(g)(2).

A petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. Id. If a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. Id. 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. Id.

In determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary). If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. See Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

If a petitioner has filed immigrant visa petitions on behalf of multiple beneficiaries, the petitioner must establish that it has had the ability to pay the proffered wage to each beneficiary. See Patel v. Johnson, 2 F.Supp.3d 108, 124 (D. Mass. 2014). Petitions filed on behalf of other beneficiaries are considered from the priority date of each petition (not including any year prior to the priority date of the petition being reviewed on appeal) until the present or until any other beneficiary obtains lawful permanent residence. Petitions that have been withdrawn or denied are not considered in this analysis.

In this case, the proffered wage is $34,050 per year and the priority date is May 18, 2016. The Petitioner submitted a copy of its 2015 federal income tax return. The record does not contain evidence of the Petitioner's ability to pay the proffered wage from 2016 onward. Without the necessary financial documentation, we are unable to determine the Petitioner's continuing ability to pay the Beneficiary's proffered wage based on its net income or net current assets from the priority date of May 18, 2016 onward.

Furthermore, USCIS records indicate that, after this petition's priority date of May 18, 2016, the Petitioner filed at least two Form I-140 petitions for other beneficiaries.[2] The record lacks proffered wages and priority dates of the other petitions. Thus, USCIS cannot calculate the total, combined proffered wages that the Petitioner must demonstrate its ability to pay. For this additional reason, the record does not demonstrate the Petitioner's ability to pay the proffered wage. Also, as we lack information regarding the Petitioner's total wage obligation, we cannot properly and fully assess the Petitioner's totality of the circumstances. See Matter of Sonegawa, 12 I&N Dec. at 614-15.

Therefore, we will remand this case for the Director to request the submission of regulatorily required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2), for the priority date year of 2016 and any subsequent year(s) in the Director's discretion. The Director may also request any other evidence that may be deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit. [3]

## III. CONCLUSION

For the reasons discussed above, we will withdraw the Director's decision and remand this case to the Director for further consideration of the Petitioner's eligibility for the immigration benefit it seeks on behalf of the Beneficiary.

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

[2] USCIS records identify the two other petitions by the following receipt numbers: [redacted] filed on Sept. 14, 2017 and [redacted] filed on Sept. 2, 2016.

[3] We also note that a search of Kentucky's Secretary of State website revealed that the Petitioner was incorporated on [redacted] 1998, and its current company standing is "bad" and its company status is "pending dissolution". https://web.sos.ky.gov/ftsearch/ (accessed Sept. 14, 2022).