U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7816413

Date: APR. 1, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a crawfish trap production and delivery worker. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner intended to employ the Beneficiary outside the terms of the labor certification. Therefore, the Director found that the record does not establish that the Petitioner made a *bona fide* job offer to the Beneficiary or that the Petitioner intends to employ the Beneficiary in the offered position.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter to the Director for further consideration and entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

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).[1] *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 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 applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is March 8, 2018. *See* 8 C.F.R. § 204.5(d).

II. JOB REQUIREMENTS

The Director determined that the Petitioner intended to employ the Beneficiary outside the terms of the labor certification. A petitioner must be "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. It 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). In the present matter, the job offer portion of the labor certification, section H, reflects no education, training, or experience requirements for the offered position. The only "specific skills or other requirements" stated for the position are set forth in section H.14, as follows: "[v]alid driver's license required; random drug screening upon hire (paid for by employer)."

To establish that a beneficiary is qualified to perform the duties of an offered position, a petitioner must demonstrate that the beneficiary has met all of the requirements set forth in the labor certification by the priority date of the petition.[2] In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements.[3]

The Director determined that the initial filing did not contain evidence that the Beneficiary met the requirements listed in section H.14, so he issued a request for evidence to the Petitioner, asking for evidence establishing that the Beneficiary had met the requirements of a driver's license and drug screen as of the visa petition's priority date. In response, the Petitioner submitted the Beneficiary's driver's license. It also submitted a statement from the Petitioner indicating that it had not exercised its right to issue random drug screening on behalf of its employees, and that the Beneficiary had not been subjected to a random drug screen.

The Director denied the visa petition, finding that the record did not establish that the Beneficiary had met the drug screening requirement in section H.14 of the labor certification as of the visa petition's priority date. Therefore, the Director found that the record does not establish that the Petitioner made a *bona fide* job offer to the Beneficiary[4] or that the Petitioner intends to employ the Beneficiary in the offered position. On appeal, the Petitioner contends that the drug screen is a post-employment, random drug testing and is not a pre-employment job requirement.

Drug tests for offered positions generally constitute job requirements. *See, e.g., Matter of Honeywell Int'l, Inc.*, 2016-PER-00434, 2018 WL 3232449 *2 (BALCA June 27, 2018) (finding contingency on the successful completion of a background check and drug test to constitute a job requirement).[5]

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[2] 8 C.F.R. § 103.2(b)(l), (12); 8 C.F.R. § 204.5(1)(3)(ii)(A); *see Matter of Wing's Tea House,*16 I&N 158 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45 (Comm'r 1971).

[3] *See Madany v. Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

[4] Citing *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987) and 8 U.S.C. § 1361, the Director stated that the Petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that a valid employment relationship is available to U.S. workers.

[5] Decisions of the Board of Alien Labor Certification Appeals (BALCA) do not bind USCIS. *See* 8 C.F.R. § 103.9(b) (stating that, in Department of Homeland Security (DHS) proceedings involving the same issues, precedent decisions of the Attorney General and the Board of Immigration Appeals bind DHS officers). But USCIS defers to DOL's reasonable

However, in this case, the Petitioner stated on the labor certification that the drug screen would be "random" and "upon hire," indicating that the Petitioner did not intend for the job offer to be contingent on successful completion of a drug screen. Conversely, a valid driver's license is a job requirement.

The record does not establish whether the Petitioner's recruitment materials for the offered position notified U.S. workers of the actual requirements for the job and how any prospective drug testing was advertised to U.S. workers. The regulation at 20 C.F.R. § 656.17(f)(7) states that advertisements placed in newspapers of general circulation or in professional journals must "not contain wages or terms and conditions of employment that are less favorable than those offered to the alien." DOL's regulations require an employer to give notice of the filing of the application for permanent employment certification,[6] to conduct required pre-filing recruitment including placing a job order and advertisements,[7] and to prepare a recruitment report[8] as part of a pre-filing recruitment effort. The Petitioner's submission of these documents may assist in determining the proper interpretation of the language in H.14 to resolve any ambiguity. As previously noted, in evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany* v. *Smith,* 696 F.2d at 1015 (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Thus, we are remanding the matter to the Director to request the Petitioner to provide a complete copy of its recruitment efforts, including the notice of the filing, job order, advertisements, and the recruitment report, to resolve any ambiguity in H.14. The Director should allow the Petitioner reasonable time to respond.

III. ABILITY TO PAY

The record does not contain regulatory required evidence of the Petitioner's ability to pay the proffered wage from the priority date on March 8, 2018, and continuing until the beneficiary obtains lawful permanent residence.[9] 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 Petitioner submitted regulatory-prescribed evidence of its ability to pay the proffered wage in 2017. However, the record does not contain regulatory-prescribed evidence of its ability to pay from 2018 onward. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

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interpretations of its labor certification regulations. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) (requiring one administrative agency to defer to another's reasonable interpretation of regulations that Congress authorized it to promulgate and enforce).

[6] 20 C.F.R. § 656.10(d).

[7] 20 C.F.R. §§ 656.17(e), (f).

[8] 20 C.F.R. § 656.17(g).

[9] The annual proffered wage is $39,291.

IV. PETITIONER'S STATUS

The petitioning entity is not in good standing with the State of Louisiana. The Louisiana Secretary of State's database lists the Petitioner's status as "Active" but "Not in Good Standing," because the company did not file its annual report. La. Sec'y of State, https://coraweb.sos.la.gov/commercialsearch/CommercialSearchDetails.aspx?CharterID=[redacted] (last visited Mar. 9, 2020). This information calls into question the Petitioner's intent to do business in the future, as well as its ability to offer the Beneficiary full-time, permanent employment. On remand, the Petitioner must account for this information and demonstrate that it has been resolved.

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