U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-F-N-&R-C-, INC.

DATE: APR. 5, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a skilled nursing facility, seeks to employ the Beneficiary as a "staff nurse/registered nurse." It seeks her classification under the third-preference, immigrant classification as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. organization to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that, contrary to U.S. Department of Labor (DOL) regulations, the Petitioner did not notify its employees of the address to where they could send evidence regarding the accompanying application for permanent employment certification.

On appeal, the Petitioner argues that its notice met requirements because it modeled the posting on a sample developed by DOL and U.S. Citizenship and Immigration Services (USCIS).

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker typically follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer usually must seek DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). If DOL approves a position, an employer next submits the labor certification with an immigrant visa petition to USCIS. Section 204 of the Act, 8 U.S.C. § 1154. If USCIS grants a petition, a foreign national may finally apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

DOL, however, has already determined that the United States lacks sufficient nurses and that employment of foreign nationals in these "Schedule A" positions will not harm the wages or working conditions of U.S. nurses. 20 C.F.R. § 656.5. DOL therefore authorizes USCIS to adjudicate labor certification applications in petition proceedings for Schedule A nurses. 20 C.F.R. § 656.15(a). Thus, in this matter, USCIS rules not only on the petition, but also on its accompanying

labor certification application. *See* 20 C.F.R. § 656.15(e) (describing USCIS's labor certification determination in Schedule A proceedings as "conclusive and final").

II. THE NOTICE OF FILING

When Congress created the current labor certification requirement, it stated that "no certification may be made unless the applicant for certification has, at the time of filing the application, provided notice of the filing" to its employees. Immigration Act of 1990, Pub. L. No. 101-649, § 122(b)(1), 104 Stat. 4978, 4994 (1990); *see also* section 212 of the Act, n. 6. Thus, when an employer offers a non-unionized position to a foreign national, it must document that it posted notice of the filing of the labor certification application to its employees at the proposed worksite for at least 10 consecutive business days. 20 C.F.R. § 656.10(d)(1)(ii).[1] The notice must: indicate that the posting stems from the filing of an application for the offered position; state that anyone may send documentary evidence about the application to the DOL certifying officer; list the address of the appropriate officer; and be posted between 30 and 180 days before the application's filing. 20 C.F.R. § 656.10(d)(3). In Schedule A cases, the notice must also describe the job and rate of pay. 20 C.F.R. § 656.10(d)(6).

Here, the Petitioner submitted a copy of the filing notice it posted regarding its labor certification application for the offered position of staff nurse. In relevant part, the notice stated:

> Any person may provide documentary evidence bearing on the application to the Certifying Officer of the U.S. Department of Labor holding jurisdiction over the location of the proposed employment. Contact information for these offices can be found on the internet at **http://www.foreignlabor.doleta.gov/foreign/contacts.asp**.

(emphasis in original). The Director concluded that, contrary to 20 C.F.R. § 656.10(d)(3)(iii), the Petitioner's notice did not "[p]rovide the address of the appropriate Certifying Officer." The Director also found that the notice referenced an inaccessible website.[2]

On appeal, the Petitioner states that it modeled its posting notice on a sample developed by DOL and USCIS. *See* Memorandum from Michael Aytes, USCIS Acting Assoc. Dir., Domestic Ops., *AFM [Adjudicator's Field Manual] Update: Chapter 22: Employment-based Petitions (AD03-01)*, HQPRD70/23.12 18-19 (Sept. 12, 2006), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/afm_ch22_091206r.pdf (last visited Mar. 1, 2019). This memorandum updated certain sections of the AFM.[3] Similar to the Petitioner's notice, the sample notice included in the AFM states:

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[1] For a unionized position, an employer must notify the bargaining representative of its employees in the same occupational classification and area of intended employment. 20 C.F.R. § 656.10(d)(1)(i).

[2] The Petitioner contests the website's inaccessibility. But the company's evidence indicates that a different DOL website lists the certifying officer's address. *See* http://www.foreignlaborcert.doleta.cfm (last visited Mar. 1, 2019).

[3] *See also USCIS Adjudicator's Field Manual*, ch. 22.2(b)(4)(C)(v), https://www.uscis.gov/sites/default/files/ocomm/

> Any person may provide documentary evidence bearing on the application to the Certifying Officer of the U.S. Department of Labor holding jurisdiction over the location of the proposed employment. Contact information for these offices can be found on the Internet at www.foreignlaborcert.doleta.gov/foreign/contacts.asp.

Id. at 19. The accompanying USCIS memo states: "Adjudicators should accept posting notices that are modeled after the sample." *Id.* at 18. Because the Petitioner drafted its notice based on the sample, it argues that its posting meets regulatory requirements. However, regulations clearly require the notice to include the address of the certifying officer. 20 C.F.R. § 656.10(d)(3). Where guidance issued via memorandum and the AFM appears to conflict with regulations; the regulations are controlling. The AFM itself states that "[t]o the extent that one policy document appears to be in conflict with another, the "higher" authority is controlling . . . . For example, if a directive in a field manual appears to conflict with a regulation, the regulation must be followed." *USCIS Adjudicator's Field Manual*, ch.3.4, https://www.uscis.gov/sites/default/files/ocomm/ ilink/0-0-0-6423. html#0-0-0-417.

Moreover, DOL has found that "Congress' primary purpose in promulgating the notice requirement was to provide a way for interested parties to submit documentary evidence bearing on the application for certification." Final Rule for Applications for Permanent Employment Certification, 69 Fed. Reg. 77326, 77337-38 (Dec. 27, 2004). Thus, filing notices must provide addresses of appropriate certifying officers to ensure that the officers receive evidence "directly" and "without delay." *Matter of Haw. Pac. U.*, 2009-PER-00127, slip op. at 13 (BALCA Mar. 2, 2010) (*en banc*).

Like USCIS, DOL publicly states its acceptance of posting notices modeled after the sample. *See* DOL, "OFLC [Office of Foreign Labor Certification] Frequently Asked Questions and Answers," "Audit Q.5," https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited Mar. 1, 2019). But DOL denies labor certification applications with notices listing certifying officer contact information containing only the website address referenced in the sample.[4] The Board of Alien Labor Certification Appeals (BALCA) has affirmed such denials, finding that 20 C.F.R. § 656.10(d)(3)(iii) requires a filing notice to provide the *mailing* address of an appropriate certifying officer, not the address of a website listing the mailing address. *See, e.g., Florence Unified Sch. Dist.*, slip op. at 3. BALCA has held that, read together, the regulation and the text of the sample notice clearly instruct employers to use the referenced website to find appropriate certifying officer mailing addresses and then list them on the employers' notices. *See, e.g., Ace Homecare*, slip op. at 3-4.

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ilink/0-0-0-6423. html#0-0-0-417 (last visited Mar. 1, 2019).

[4] *See, e.g., Matter of St. Jude Children's Research Hosp.*, 2014-PER-00979 (BALCA Aug. 21, 2018); *Matter of Bloomberg L.P.*, 2015-PER-00152 (BALCA Mar. 12, 2018*); Matter of Florence Unified Sch. Dist. #1*, 2015-PER-00524 (Feb. 27, 2018); *Matter of Hill Phoenix*, 2015-PER-00256 (BALCA Feb. 8, 2018); *Matter of Ace Homecare, LLC*, 2016-PER-00056 (BALCA Nov. 21, 2016) (all affirming denials based on posting notices that listed the website address stated in the sample) .

While we are not bound by BALCA decisions, we may take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process. *See* 8 C.F.R. § 103.3(c) (stating that precedent decisions of the Attorney General, Board of Immigration Appeals, and USCIS bind USCIS employees in the administration of the Act). DOL promulgated the regulations at issue in this matter; we therefore find the regulatory interpretations of DOL to be persuasive. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) (requiring deference to an agency's reasonable construction of a provision it administers). Contrary to DOL's regulatory requirements, the Petitioner's notice of filing omitted the required mailing address of the certifying officer. We will therefore affirm the petition's denial.

III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also does not establish the Petitioner's ability to pay the position's proffered wage. A petitioner must demonstrate its continuing ability to pay a proffered wage, 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 a petitioner's annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs at least 100 workers, however, USCIS may accept a statement from a financial officer. *Id.*

Here, the labor certification application states the proffered wage of the offered position of staff nurse as $54,184 a year. The petition's priority date is October 19, 2017, its filing date. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's filing date).

The record indicates the Petitioner's employment of more than 100 people. The Director therefore accepted a statement from the Petitioner's regional nursing director as proof of its ability to pay the proffered wage. USCIS records, however, indicate the Petitioner's filing of multiple immigrant petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here therefore must demonstrate its ability to pay the combined proffered wages of this and its other petitions that were pending or approved as of this petition's priority date, or filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming revocation of a petition's approval where, as of its grant, a petitioner did not demonstrate its ability to pay the combined proffered wage of multiple petitions).[5]

USCIS records indicate the Petitioner's filing of at least five other petitions there were pending or approved as of October 19, 2017, or filed thereafter.[6] Because the Petitioner must demonstrate its ability to pay the combined proffered wages of this and the other petitions, the statement from its

[5] The Petitioner need not demonstrate its ability to pay any proffered wages of petitions that it withdrew, or, unless they remain pending on appeal, that USCIS denied or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions.

[6] USCIS records identify the petitions by the following receipt numbers:

regional director of nursing does not establish its ability to pay the proffered wage. Rather, in any future filings in this matter, the Petitioner must provide copies of annual reports, federal tax returns, or audited financial statements for 2017 and, if available, 2018. The Petitioner must also provide the proffered wages and priority dates of its five other petitions. Also, the Petitioner may submit additional evidence of its ability to pay, including evidence of any wages it paid to applicable beneficiaries in 2017 or 2018, and supporting the ability-to-pay factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

IV. CONCLUSION

The record does not establish the Petitioner's compliance with DOL posting-notice requirements. Contrary to Section 291 of the Act, 8 U.S.C. § 1361, the petitioner has not demonstrated its eligibility for the benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of B-F-N-&R-C-, Inc.*, ID# 3102822 (AAO Apr. 5, 2019)