U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 8090905

Date: APR. 7, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional Worker

The Petitioner seeks to employ the Beneficiary as a physical therapist under the third-preference, immigrant classification for professional workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner did not demonstrate the *bona fides* of the job opportunity.

In these revocation proceedings, the Petitioner bears the burden of establishing eligibility for the requested benefit. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (citation omitted). 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 professional usually follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. If USCIS grants a petition, a designated noncitizen 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 physical therapists and that employment of noncitizens in these "Schedule A" positions will not harm the wages or working conditions of U.S. physical therapists. 20 C.F.R. § 656.5. DOL therefore does not require labor certification employers to advertise physical therapy positions to U.S. workers in the general population and authorizes USCIS to adjudicate labor certification applications for physical therapists in immigrant visa petition proceedings. 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 determinations for Schedule A positions as "conclusive and final").

"[A]t any time" before a beneficiary obtains lawful permanent residence, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS may issue a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner's NOIR response does not overcome the stated revocation grounds, USCIS may revoke a petition's approval. *Id.* at 451-52.

## II. THE BONA FIDES OF THE JOB OPPORTUNITY

A labor certification employer - including one seeking certification of a Schedule A occupation - must 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).

> Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a bona fide job opportunity.

*Matter of Modular Container Sys., Inc.*, 89-INA-228, slip op. at *7 (BALCA July 16, 1991) (*en banc*).

The Petitioner filed this petition and its accompanying Schedule A application for the offered position of physical therapist in January 2017. The Director's NOIR notes that the company posted notice of the filing of the Schedule A application to its employees beginning in November 2016. *See* section 212 of the Act, n. 6; 20 C.F.R. § 656.10(d)(6) (referring to 20 C.F.R. § 656.10(d)(1)(ii)) (requiring labor certification employers to post notices of their filings for at least 10 consecutive business days). But, at a later interview regarding his immigrant visa application, the Beneficiary stated that he learned of the Petitioner's job opportunity in June or July of 2016, before the company posted notice of the position to its employees.[1] The Beneficiary, who lives in Pakistan, said he learned of the job from his uncle, a physical therapist in the United States. Also, in 2010 or 2013, the Beneficiary reportedly met

[1] On appeal, the Petitioner argues that, by omitting the location of the Beneficiary's interview, the NOIR did not sufficiently describe the interview and hindered the company's ability to respond to the notice's allegations. But the Beneficiary's immigration status and the NOIR's context made clear the notice's reference to the Beneficiary's immigrant visa interview. Also, the Petitioner's NOIR response asserted that USCIS should have provided the company with a copy of the report on the immigrant visa interview. Thus, the Petitioner understood the NOIR's reference to the Beneficiary's immigrant visa interview. Regarding the assertion in the NOIR response, USCIS need not let a petitioner inspect a document if the Agency advised the business of the document's derogatory information before issuing an adverse decision based on the information. 8 C.F.R. § 103.2(b)(16)(i). The NOIR sufficiently notified the Petitioner of the derogatory information in the report on the immigrant visa interview. The Petitioner's arguments are therefore unavailing.

the Petitioner's administrator/owner at a wedding in Pakistan. Based on this evidence, the NOIR states that "it appears the job was not properly offered and/or advertised to potential U.S. workers."

The NOIR's allegations, however, would not have warranted the petition's denial. The NOIR appears to assert that an employer cannot offer a noncitizen a permanent job in the United States before notifying its U.S. workers of the position. But the NOIR cites no legal authority for this proposition, nor are we aware of any. Employers must advertise most kinds of positions before filing labor certification applications. 20 C.F.R. § 656.17(e). But, as to when employers can offer positions to noncitizens, the Act and DOL's regulations are silent. DOL's prior labor certification regulations *required* employers to offer positions to noncitizens before filing applications and placing advertisements. *See* 20 C.F.R. § 656.21(g) (2004). When issuing the current regulations, DOL did not indicate that employers must delay offering positions to noncitizens until after notifying U.S. workers of the job opportunities. *See* Final Rule for Labor Certification for the Permanent Employment of Aliens in the United States, 69 Fed. Reg. 77326 (Dec. 27, 2004).

Moreover, as previously indicated, DOL has already determined that the United States lacks sufficient physical therapists. Labor certification employers therefore need not advertise positions for physical therapists to U.S. workers in the general population. *See* 20 C.F.R. § 656.15 (stating requirements for Schedule A applications). The NOIR alleges that "the job was not properly . . . advertised to potential U.S. workers." But USCIS cannot fault the Petitioner for failing to do what was not required.

The NOIR apparently uses the term "advertised" to refer to the filing notice that DOL regulations required the Petitioner to post to its employees. DOL, however, does not consider recruitment of U.S. workers as the major function of a posting notice. "In our view, Congress' primary purpose in promulgating the notice requirement was to provide a means for persons to submit documentary evidence bearing on the [labor certification] application," for example, evidence regarding available workers, wages, working conditions, or an employer's level of compliance with a position's terms and conditions. Final Rule for Labor Certification, 69 Fed. Reg. at 77326. In any event, the Petitioner provided a copy of its posting notice demonstrating the company's compliance with applicable regulations. The record therefore does not support the Petitioner's alleged, improper "advertisement" of the position to U.S. workers.

In addition, the NOIR does not allege a personal relationship between the Beneficiary and the Petitioner's administrator/owner substantial enough to render the offered position unavailable to U.S. workers. The NOIR states that the men met several years ago at a wedding. The description of this single, social meeting does not establish a "close personal relationship" that would likely prevent the Petitioner's hiring of a qualified U.S. worker for the position. *See Matter of Modular Container*, slip op. at *7.

Even if the meeting between the men indicated a close personal relationship, the revocation decision does not properly analyze the *bona fides* of the job opportunity. A determination of the availability of an offered position to U.S. workers requires a totality-of-the-circumstances test involving consideration of a variety of factors, no one of which is determinative. *Matter of Modular Container*, slip op. at *8. The factors include whether a foreign national: can control or influence hiring decisions regarding an offered position; has a relationship with an employer's corporate directors, officers, or employees; is so inseparable from an employer that it would not likely continue operations in his or

her absence; incorporated or founded the business; owns all or part of it; participates in its management; serves on its board of directors; is one of a small number of employees; or qualifies for a job based on specialized or unusual job duties or requirements. *Id.* at **8-10. Adjudicators must also consider an employer's level of compliance and good faith during labor certification proceedings. *Id.* at *10.

The Director declined to apply *Modular Container*'s test, stating that decisions of DOL's Board of Alien Labor Certification Appeals (BALCA) do not bind USCIS officers. *See* 8 C.F.R. § 103.10(b) (providing that published decisions of the U.S. Attorney General and Board of Immigration Appeals bind Department of Homeland Security employees in proceedings involving similar issues). Although BALCA decisions do not formally bind USCIS, Congress gave DOL authority over labor certification applications. *See* section 212(a)(1)(A)(5) of the Act. DOL allows USCIS to adjudicate labor certification applications for Schedule A occupations. *See* 20 C.F.R. § 656.15(a). But DOL issued the regulations that USCIS must follow in adjudicating these applications. *Id.* An administrative agency should defer to the reasonable regulatory interpretations of another agency that Congress has charged with administering applicable rules. *Martin v. Occupational Health & Safety Review Comm'n*, 499 U.S. 144, 150-59 (1991). Through BALCA, DOL established a reasonable test to determine the availability of an offered position to U.S. workers. The Director therefore should have followed *Modular Container* in determining the *bona fides* of the offered position.

For the foregoing reasons, we will withdraw the Director's decision and remand the matter. If the Director believes that the record would have warranted the petition's denial based on the *bona fides* of the job opportunity, she must issue a new NOIR on remand. A new NOIR must sufficiently allege grounds for the proposed revocation and provide the Petitioner with a reasonable period to respond. *See* 8 C.F.R. § 205.2(b).

## III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record at the time of the NOIR's issuance did not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent resident status. 8 C.F.R. § 204.5(g)(2). If a petitioner employs less than 100 people, as here, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

The labor certification states the proffered wage of the offered position of physical therapist as $62,000 a year. The petition's priority date is January 13, 2017, the date of the petition's filing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). USCIS also approved the petition in 2017.

The Petitioner submitted a copy of its federal income tax return for 2015. The record, however, lacks required evidence of the Petitioner's ability to pay in 2017, the year of the petition's priority and approval dates. Therefore, contrary to 8 C.F.R. § 204.5(g)(2), the Petitioner did not demonstrate its ability to pay the proffered wage from the petition's priority date.

On remand, the Director should issue a new NOIR instructing the Petitioner to submit copies of an annual report, federal tax return, or audited financial statement for 2017. The Petitioner may also submit additional evidence of its ability to pay the proffered wage that year, including evidence of any wages it paid the Beneficiary or materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

If supported by the record, the new NOIR may include additional, potential revocation grounds. The Director should afford the Petitioner a reasonable period 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.

## IV. CONCLUSION

The NOIR's allegations would not have warranted the petition's denial. The Petitioner, however, did not demonstrate its ability to pay the proffered wage of the offered position.

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