U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF [redacted]

DATE: APR. 19, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a poultry processing business, seeks to employ the Beneficiary as a poultry processor. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. *See* 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 omitted information on the ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification), regarding the Beneficiary's prior employment.

On appeal, the Petitioner submits additional evidence and asserts that no experience was required for the proffered position and that, if the Beneficiary's experience had been more accurately explained on the labor certification, the experience would support the Beneficiary's qualifications for the proffered position.

Upon *de novo* review, we will withdraw the decision of the Director and remand the matter for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

I. LAW AND ANALYSIS

A. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer must obtain 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

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date." *See* 8 C.F.R. § 204.5(d). In this case, the priority date is January 29, 2016. Therefore, the Petitioner must establish that all eligibility requirements for the petition have been satisfied from January 29, 2016, and continuing through the present.

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. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file 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 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.

B. Beneficiary Qualifications

In this case, the labor certification states that the offered position has no minimum education, training, or experience requirements.[2] However, the Director denied the petition because he found that the Beneficiary omitted information on the labor certification regarding his prior employment. Specifically, the Director stated that the Beneficiary indicated that he was an "employee" of [redacted] in [redacted] South Korea [redacted] instead of indicating that he was a "butcher" at [redacted] The Director stated that the "failure to more unambiguously detail on the ETA Form 9089 the precise nature of the beneficiary's work with [redacted] constitutes a crucial omission" that could have prevented the DOL "from pursuing a line of inquiry that eventually may have led to the denial of the ETA Form 9089."

However, as properly noted by the Petitioner on appeal, the proffered job requires no prior experience. Therefore, the Beneficiary's prior experience is not relevant to these proceedings. The use of the word "employee" rather than "butcher" was not a crucial omission that would have led to the denial of the labor certification, as the Beneficiary's prior experience was not at issue before the DOL. We will therefore withdraw the decision of the Director and remand the matter for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

C. Bona Fide Job Opportunity

On remand, the Director should determine whether the Petitioner violated DOL regulations which prohibit a beneficiary's payment of recruitment costs associated with the labor certification. Specifically, the regulation at 20 C.F.R. § 656.12 states:

> (a) Applications for permanent labor certification and approved labor certifications are not articles of commerce. They shall not be offered for sale, barter or purchase by individuals or entities. Any evidence that an application for permanent labor certification or an approved labor certification has been sold, bartered, or purchased shall be grounds for investigation under this part and may be grounds for denial under § 656.24, revocation under § 656.32, debarment under § 656.31(f), or any combination thereof.

[2] Part H.14 of the labor certification requires an initial drug screening during or immediately preceding new hire orientation. The Petitioner submitted the Beneficiary's negative drug screen results dated January 5, 2016.

> (b) An employer must not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application, except when work to be performed by the alien in connection with the job opportunity would benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer. For purposes of this paragraph (b), payment includes, but is not limited to, monetary payments; wage concessions, including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor.
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> (c) Evidence that an employer has sought or received payment from any source in connection with an application for permanent labor certification or an approved labor certification, except for a third party to whose benefit work to be performed in connection with the job opportunity would accrue, based on that person's or entity's established business relationship with the employer, shall be grounds for investigation under this part or any appropriate Government agency's procedures, and may be grounds for denial under § 656.32, revocation under § 656.32, debarment under § 656.31(f), or any combination thereof.

In this case, the record contains a contract between the Beneficiary and a recruitment agency showing a $20,000 payment required by the Beneficiary for the agency's services. However, the contract does not list the agency's services provided to the Beneficiary under the terms of the contract.

The record also contains a letter from the Petitioner stating that:

- It appointed the recruitment agency to recruit workers in Asia;
- The Petitioner did not receive any compensation from the Beneficiary or the recruitment agency;
- The Petitioner paid all costs associated with the labor certification and it did not incur legal fees for the labor certification because the work was performed in-house;
- The recruitment agency conducted interviews of potential applicants to ensure they were aware of the position being offered, job duties, wage, and location of the job; and
- The recruitment agency subsequently sent the interview results to the Petitioner.

However, the letter does not indicate the total sum of money, if any, that the Petitioner paid the recruitment agency for its work, and the record does not contain a contract between the Petitioner and the recruitment agency.

Further, the record contains a letter from the Beneficiary stating that he did not pay the Petitioner any sums relating to the labor certification, but that he did pay the recruitment agency "for the recruiting and settlement services" as detailed in the contract (however, as previously noted, those services aren't detailed in the contract). It appears that the Beneficiary paid recruitment costs in connection with the labor certification in violation of 20 C.F.R. § 656.12. The Beneficiary's financial involvement in the labor certification process casts suspicion on the integrity of the process and the existence of a *bona fide* job opportunity. *See* Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, 72 Fed. Reg. 27903, 27920 (May 17, 2007) (codified at 20 C.F.R. pt. 656). On remand, the Director should request the contract between the Petitioner and the recruitment agency, evidence of any payments made in connection with the recruitment of the Beneficiary, and any other evidence that may show whether the Beneficiary, the Petitioner, or both, paid recruitment costs associated with the labor certification.

D. Ability to Pay the Proffered Wage

On remand, the Director should also determine whether the Petitioner established its ability to pay the proffered wage as of the January 29, 2016, priority date onward.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The proffered wage is $8.91 to $10.21 per hour.

In this case, the record does not contain annual reports, federal tax returns, or audited financial statements for the Petitioner from 2016 onward as required by 8 C.F.R. § 204.5(g)(2).[3] Although we

[3] The record contains the Petitioner's audited financial statements for the fiscal year ending May 30, 2015, which does not include the priority date. The record also contains a letter form the Petitioner indicating that it employs over 6,000

note that the 2016 audited financial statements or tax return might not have been available at the time of filing, on remand, the Director should request regulatory-required evidence of the Petitioner's continuing ability to pay the proffered wage.

II. CONCLUSION

The decision of the Director regarding the Beneficiary's experience will be withdrawn. The matter is remanded to the Director for consideration of the existence of a *bona fide* job opportunity and the Petitioner's ability to pay the proffered wage. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of* [redacted] ID# 374256 (AAO Apr. 19, 2017)

workers. However, the letter does not list the Beneficiary's name, and it appears to be a letter used for multiple petitions filed by the Petitioner. The Petitioner has filed hundreds of Form I-140s. Consequently, USCIS must take into account the Petitioner's ability to pay the Beneficiary's wages in the context of its overall recruitment efforts. The Petitioner must demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ.