U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-Y-W-, INC.

DATE: APR. 25, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an operator of dry cleaning businesses, seeks to employ the Beneficiary as a sewer. It requests her classification under the third-preference, immigrant category as an "other worker." Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This category allows a U.S. business to sponsor a foreign national with less than two years of training or experience for lawful permanent resident status.

The Acting Director of the Nebraska Service Center denied the petition. The Director found that the Petitioner did not demonstrate the required ability to pay the proffered wage.

On appeal, the Petitioner submits additional evidence and asserts that the Director overlooked proof of its ability to pay.

Upon *de novo* review, we will withdraw the Director's decision and remand this matter for further consideration consistent with the following opinion.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill an offered position in the United States with a foreign national, an employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i) (requiring the DOL to certify that insufficient workers are able, willing, qualified, and available for a position and that employment of a foreign national will not harm the wages and working conditions of U.S. workers in similar jobs). If the DOL certifies a position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves a petition, a foreign national may finally 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.

II. ABILITY TO PAY THE 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.[1] 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS first examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS next considers whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and the actual wages paid. If net income and net current assets are insufficient, USCIS may also consider other factors affecting a petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

Here, the accompanying labor certification states the proffered wage of the offered position of sewer as $28,000 a year. The Petitioner did not submit any evidence of its payments to the Beneficiary in 2017, the year of the petition's priority date. Based solely on payments to the Beneficiary, the record therefore does not establish the Petitioner's ability to pay the proffered wage.

The Director based his decision on the most recent required evidence available: copies of the Petitioner's federal income tax returns for 2016. On appeal, however, the Petitioner submits copies of its tax returns for 2017.

The Petitioner's 2017 tax returns reflect net income of $36,016. That amount exceeds the annual proffered wage of $28,000. The record on appeal therefore establishes the Petitioner's ability to pay the proffered wage. We will therefore withdraw the Director's decision.

III. THE *BONA FIDES* OF THE JOB OPPORTUNITY

The Petitioner has overcome the denial ground. But the record does not establish the petition's approvability. We will therefore remand this matter.

Although unaddressed by the Director, the record does not establish the *bona fides* of the job opportunity. USCIS may deny a petition accompanied by a labor certification that violates DOL regulations. *See Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. 656.30(c)(2) where the accompanying certification was invalid for the geographic area of intended employment). USCIS may also invalidate a

[1] This petition's priority date is March 22, 2017, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009).

certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

A labor certification employer 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). "This provision infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955 *7 (BALCA July 16, 1991) (*en banc*) (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

Here, the Petitioner attested on the labor certification to the *bona fides* of the job opportunity for a sewer. The record, however, contains evidence of a prior business and personal relationship between the Petitioner and the Beneficiary. *See Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000) (holding that a relationship triggering concerns about the *bona fides* of a job opportunity "is not only of the blood; it may be financial, by marriage, or through friendship").

On appeal, the Petitioner submitted copies of joint federal income tax returns of its sole shareholder and his spouse for 2016. The tax returns indicate the sole shareholder's spouse's employment that year by a Washington corporation whose sole officer is the Beneficiary's spouse. *See* Wash. Sec'y of State, Corps., Business Search, https://www.sos.wa.gov/corps/ (last visited Mar. 27, 2018). USCIS records also indicate that the corporation filed an immigrant petition on behalf of the spouse of the Petitioner's sole shareholder.[3]

The Washington corporation's employment and immigration sponsorship of the spouse of the Petitioner's sole shareholder indicates a prior business and personal relationship between the Beneficiary and the Petitioner. The relationship casts significant doubt on the availability of the offered position to U.S. workers. *See Matter of Modular Container*, 1991 WL 223955 at *8 (stating that a relationship between a labor certification employer and a foreign national may indicate a non-*bona fide* job opportunity).

On remand, the Director should ask the Petitioner to detail the nature of its relationship with the Beneficiary and to submit additional evidence that the offered position is clearly open to U.S. workers. Requested evidence should address the *bona fide* job opportunity factors stated in *Modular Container* and include copies of additional documentation of the Petitioner's recruitment for the offered position during the labor certification process, including its newspaper advertisements, recruitment report, and any applications or resumes received from applicants. The Director may request additional evidence addressing any additional petition deficiencies he may notice.

The Director should give the Petitioner a reasonable opportunity to provide all requested evidence. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

[3] USCIS records identify the petition by the receipt number [redacted]

IV. CONCLUSION

Contrary to the Director's decision, the Petitioner on appeal has demonstrated its ability to pay the proffered wage. The record, however, does not establish the *bona fides* of the job opportunity.

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

Cite as *Matter of S-y-W-, Inc.*, ID# 1165602 (AAO Apr. 25, 2018)