U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18020157

Date: AUG. 09, 2021

Certification of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a teacher. It requests classification of the Beneficiary under the third-preference, immigrant classification for professional workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval. Following an investigation into the recruitment practices of the Petitioner's executive director of human resources, that individual plead guilty resulting in his sentencing for falsifying immigration documents.

Specifically, On [redacted], 2017, the Petitioner's executive director of human resources (HR) was sentenced to 24 months in federal prison and ordered to pay restitution based on his [redacted] 2017 guilty plea to one count of conspiracy to commit false statements in connection with immigration documents. According to his plea, the executive director of HR, employed from 1998 to 2013, was responsible for recruiting foreign teachers to fill open positions with the Petitioner. Between 2007 and 2012, the executive director of HR, along with outside recruiters, recruited and hired foreign teachers on behalf of the Petitioner, in lieu of hiring U.S. workers for those positions. The executive director of HR "engaged in a criminal conspiracy" with outside recruiters "to recruit and hire foreign teachers that [the Petitioner] did not necessarily need." In so doing, the executive director of HR signed and falsified documents submitted to the U.S. Department of Labor (DOL), falsely attesting that, despite the Petitioner's attempts to recruit U.S. workers for its open teacher positions, no U.S. workers were found to be qualified, interested or available. The executive director of HR "certified that all U.S. workers who applied for the job opening were rejected for lawful job related reasons when [he] knew this was not the case." Additionally, "to support these false statements, [he] created recruitment reports which contained additional false statements regarding the number of U.S. applicants for the open positions and the reasons for the rejection of the U.S. applicants." The executive director of HR also charged the foreign workers inflated fees associated with the immigration process and received unlawful remuneration in connection with those fees. *See* https://www.justice.gov/usao-ndtx/pr[redacted] (accessed on August 5, 2021).

As a result, the Director concluded that the Petitioner misrepresented a material fact, and that it did not establish that a *bona fide* job offer existed.

After the Director's revocation, the Petitioner filed a motion to reopen and reconsider the revocation. In granting the motion, the Director withdrew his finding of willful misrepresentation of a material fact, but again concluded that the Petitioner did not establish that a *bona fide* job offer existed and affirmed the revocation of the petition's approval. The Director certified his decision to our office for review pursuant to 8 C.F.R. § 103.4(a)(1), which provides that decisions by field office or service center directors may be certified to the AAO "when the case involves an unusually complex or novel issue of law or fact."

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

To pursue employment-based immigration and to permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id*.

If DOL approves a position, an employer proceeds to submitting the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. Upon approval of the petition, a foreign national may apply for an immigrant visa abroad, or if eligible, adjust status in the United States to lawful permanent resident. *See* section 245 of the Act, 8 U.S.C. § 1255.

At any time before a beneficiary obtains lawful permanent residence, however, 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 the record and substantial evidence, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice

was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

II. ANALYSIS

A. Procedural History

The Petitioner here is an independent school district. The underlying labor certification for the offered position of teacher was filed with DOL on May 14, 2007.[1] DOL's regulations require an employer to give notice of the filing of the application for permanent employment certification,[2] to conduct required pre-filing recruitment including placing a job order with the State Workforce Agency and advertisements,[3] and to prepare a recruitment report[4] as part of a pre-filing recruitment effort. In filing the labor certification, the Petitioner attested that the job opportunity was clearly open to any U.S. worker, that it conducted its recruitment for able, willing, qualified, and available U.S. workers from January to April 2007, and that the U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons.

Following the labor certification's approval, the Petitioner timely filed an immigrant petition with the labor certification seeking to employ the Beneficiary as a teacher and that immigrant petition was approved on September 19, 2008.

Following the approval of that petition, the Director notified the Petitioner of derogatory information that called into question whether the Beneficiary paid prohibited costs for the submission of the labor certification.[5] Specifically, the Director noted the following facts:

- On [redacted] 2014, the Petitioner self-reported violations of its nonimmigrant visa program for temporary workers to U.S. Immigrations and Customs Enforcement's Homeland Security Investigations.
- During an interview with U.S. government officials on [redacted] 2016, the Petitioner's executive director of HR, who was responsible for recruiting foreign workers, admitted to making false statements in connection with immigration documents. As noted in the initial revocation, he admitted to not considering or interviewing U.S. workers for the positions, and falsified the reports of recruitment for foreign labor certifications submitted to DOL; he also admitted that he benefitted financially from recruitment of foreign workers, as he charged fees to prospective foreign employees.

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[1] The priority date of a petition is the date DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).
[2] 20 C.F.R. § 656.10(d).
[3] 20 C.F.R. §§ 656.17(e), (f).
[4] 20 C.F.R. § 656.17(g).
[5] A beneficiary's payment of costs in connection with the labor certification is a violation of 20 C.F.R. § 656.12. A 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. § 656.12).

- On [redacted] 2017, the Petitioner's executive director of HR pled guilty to one count of conspiracy to commit false statements in connection with immigration documents and was later sentenced to time in federal prison and restitution.
- In his plea, the Petitioner's executive director of HR admitted to signing and filing 38 labor certifications from August 27, 2012 to December 6, 2012, in which he knowingly made false statements; those certifications falsely stated that all U.S. workers who applied for the job opening were rejected for lawful job-related reasons, and the accompanying recruitment reports falsely stated the number of U.S. applicants and the reasons for their rejection.

The Director found that the Petitioner's executive director of HR, who admitted to charging fees to foreign workers and falsifying recruitment reports, signed the underlying labor certification in this matter. In the NOIR, he requested evidence to establish that the job opportunity was clearly open to any U.S. worker and that U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons. He also requested evidence that the Petitioner did not require the Beneficiary to pay prohibited costs associated with the labor certification, and that it had the ability to pay the Beneficiary the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

In response to the NOIR, the Petitioner submitted evidence that it has actually employed the Beneficiary and has paid the Beneficiary at or above the proffered wage from 2007 to 2015. The Petitioner noted that records associated with labor certifications need only be retained for a period of five years from the date of filing, pursuant 20 C.F.R. § 656.10(f). It stated that, despite its best efforts, it was unable to obtain the recruitment report prepared in support of the underlying labor certification, but it did provide copies of two newspaper advertisements that were part of the pre-filing recruitment for the offered position, as obtained directly from the newspaper. The Petitioner also provided evidence that in 2007, the year the labor certification was filed, there was an overall shortage of qualified teachers available in its geographic location. With respect to the evidence USCIS requested that the Petitioner did not require the Beneficiary to pay costs associated with the labor certification, the Petitioner provided evidence that it reimbursed the Beneficiary for these expenses.

The Director revoked the petition's approval, finding that a *bona fide* job offer never existed and that the Petitioner willfully misrepresented a material fact on the labor certification. The Petitioner filed a subsequent motion to reopen and reconsider the revocation, which the Director granted and certified his decision to us for review.

In its motion, the Petitioner noted that DOL's final rule regarding improper commerce and payment for labor certifications was not issued until *after* the filing of the labor certification and should not be applied in this case to find willful misrepresentation of a material fact against the Petitioner. In his notice of certification, the Director agrees with the Petitioner that the final DOL rule concerning improper payment was issued after the priority date in this case and he withdraws his finding of willful misrepresentation against the Petitioner. However, the Director affirms the revocation of the petition's approval because the Petitioner did not establish that it had a *bona fide* job opportunity to which U.S. workers could apply.

The Petitioner provides a statement in response to the Director's notice of certification. In its statement, the Petitioner asserts that, although the plea agreement made by its former representative

specifically identifies false statements in labor certifications filed in 2012, there is no evidence that labor certifications filed outside that period, including the instant labor certification filed in 2007, also involved false statements.[6] The Petitioner asks that USCIS exercise discretion in not revoking the approval of the petition because it and the Beneficiary were "victims of fraud ... [and] were not aware of ineligibility and intended no fraud or deception."[7]

B. The *Bona Fides* of the Job Opportunity

A labor certification is evidence of an individual foreign worker's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

On the ETA Form 9089 at section N, item 8, labor certification employers 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)). The labor certification is incorporated into the I-140 petition pursuant to 8 C.F.R. § 103.2(b)(1) which states that "[a]ny evidence submitted in connection with a benefit request is incorporated into and considered part of the request."

Under its statutory authority, USCIS must examine the *bona fides* of a job opportunity to evaluate the merits of a petition filed by an employer "desiring and intending to employ" a foreign worker under the employment-based preference categories that require a labor certification. *See* section 204(a)(1)(F) of the Act. Under sections 204(b) and 212(a)(5)(A)(i) of the Act, USCIS ensures that the facts of the labor certification are true - that there are insufficient workers able, willing, qualified and available whose employment will not adversely affect the wages and working conditions of similarly employed U.S. workers. The labor certification regulations 20 C.F.R. § 656.10(c)(8) and §656.3 reflect that the

[6] We note, however, that the Petitioner admits to paying restitution fees of over $1.4 million "to address errors made by certain teachers' legal representatives regarding the payment of certain immigration related fees and the unlawful actions of [redacted] previously unknown to the petitioner." Nothing shows that the Petitioner refiled a labor certification on the Beneficiary's behalf to correct anything related to the hiring process and in consideration of potentially qualified U.S. workers.

[7] The Petitioner cites to a section of the Adjudicator's Field Manual, referring to commencement of rescission proceedings for those already granted lawful permanent residence. We note that this matter does not involve rescission proceedings and the Beneficiary has not been granted lawful permanent residence.

petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987), citing *Pasadena Typewriter and Adding Machine Co., Inc. v. Department of Labor*, Case No. CV-83-5516-AAH(T), Slip op. (C.D.Cal. March 26, 1984); *Bulk Farms, Inc. v. Martin* (9th Cir. 1992) 963 F.2d 1286 *citing INA Legislative History,* H.R.Rep. No. 1365 Cong., 2d Sess.

In this matter, the Director issued the NOIR for good and sufficient cause. The Petitioner's former representative who signed and filed the I-140 petition and supporting labor certification with USCIS admitted making false statements with respect to the availability of the job opportunity to U.S. workers in multiple filings, including whether U.S. workers were rejected for lawful job-related reasons, and was involved in recruitment of foreign workers spanning the time period of the instant case. This admission was sufficient to indicate a pattern of behavior and prompt the Director to inquire about the *bona fides* of the job offer in other cases, even those not involving a specific admission of false statements. Given the significant admissions and material false statements admitted to in 2012 forming the basis of the executive director of HR's guilty plea, and his involvement in foreign recruitment from 2007 to 2012, this information may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of other requested immigration benefits. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Here, in attempt to establish that a *bona fide* job opportunity was made available to U.S. workers, the Petitioner submits two advertisements it ran in preparation for the labor certification filing, and a report identifying a shortage of teaching professionals in its geographical location. This evidence tends to support that the Petitioner did advertise the position as required by pre-filing recruitment for the labor certification and may have complied with some of the requirements. It may also support that the Petitioner had a need to fill the offered position at the time the labor certification was filed. However, this evidence does not directly address the concerns raised by the Director, and by the admission of prior false statements. The Petitioner's evidence does not establish that the position was truly open to U.S. workers pursuant to 20 C.F.R. § 656.10(c)(8) and attestations on the labor certification itself, or that the Petitioner was unable to find sufficient U.S. workers who were able, willing, and qualified for the offered position. Further, because of the Petitioner's executive director of HR's admissions that during the timeframe of this case, he was purposefully interfering with the substantive and procedural requirements of the labor market test of the labor certifications, it is more likely than not that U.S. workers who did apply for the position were not actually considered and lawfully rejected. While we agree that the regulatory period of document retention for the recruitment report supporting this labor certification has expired, the Petitioner has not supported its assertions that the job offer was *bona fide* with other evidence beyond the recruitment report as noted by the Director in the NOIR, such as hiring reports or other records documenting that it did, in fact, consider or hire U.S. workers as teachers in 2007. Nor does the Petitioner assert that such information is unavailable for any reason.[8] The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Id.* As nothing shows that the position was truly open, it does not appear that the petition is accompanied by a valid labor certification required by 8 C.F.R. § 204.5(a)(2) and section 212(a)(5)(A)(i) of the Act.

[8] USCIS will not consider secondary evidence unless the petitioner establishes that primary evidence does not exist or cannot be obtained. *See* 8 C.F.R. § 103.2(b)(2)(i).

The Petitioner states, "the failure by USCIS to provide any derogatory evidence related to the labor certification ... concerning [the Beneficiary] in 2007 does not support its allegation of the lack of a *bona fide* job offer." We disagree. Under INA 205, USCIS may revoke its approval of any visa petition it has approved for what it deems to be "good and sufficient cause." *See Matter of Tawfik*, 20 I&N Dec 166 (BIA 1990), *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). USCIS has requested that the Petitioner provide information to establish that they did have a *bona fide* job opportunity. However, the Petitioner did not provide such evidence. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). *See also* 8 C.F.R. § 103.2(b) (applicant or petitioner must establish eligibility for the requested benefit at the time of filing and continue to be eligible through adjudication). Here, the Petitioner's reimbursement to the Beneficiary for recruitment costs, as well as the admission of prior false statements regarding numerous labor certifications, and the executive director of HR's involvement in recruitment covering the timeframe of this instant case was sufficient cause for the Director to issue the NOIR, and the Petitioner does not provide independent, objective evidence to establish that the job opportunity was clearly open to U.S. workers at the time of filing. Therefore, the Petitioner has not established that a *bona fide* job existed.

ORDER: The approval of the petition is revoked.