U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-, INC.

DATE: AUG. 19, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

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

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the position offered is a *bona fide* job opportunity or job offer. On appeal, the Petitioner asserts that the Director's decision is factually inaccurate and legally insufficient.

Upon *de novo* review, we will remand the matter to the Director for further consideration and entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains 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 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. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files 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 applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is February 8, 2018. *See* 8 C.F.R. § 204.5(d).

II. BONA FIDE JOB OPPORTUNITY

The Beneficiary indicated in a supporting letter that he interviewed with the Petitioner for the offered position in November 2016. The record shows that the recruitment for the job occurred between September and December 2017. The Director indicated in his decision that the Petitioner "interviewed and decided to hire the Beneficiary prior to the actual recruitment." Thus, he determined that the recruitment efforts were not conducted in good faith because the job offer was limited to the Beneficiary and that no U.S. workers were "truly allowed a realistic opportunity to apply, applied, or interviewed." The Director determined that the Petitioner did not demonstrate that the position being offered is a *bona fide* job opportunity.[2]

Because of the design of the labor certification process, every petitioner who files a labor certification has already identified a foreign national that they wish to hire prior to the required recruitment. The Petitioner's identification of the Beneficiary prior to the required recruitment, or even its employment of the Beneficiary in the offered job, does not indicate the lack of a *bona fide* job opportunity. Rather, it indicates that the Petitioner followed DOL regulations in following PERM[3] protocol after identifying a foreign national for the position. *See, e.g.,* 20 C.F.R. § 656.17. Thus, the Director erred in denying the petition for lack of a *bona fide* job opportunity solely due to the Petitioner's identification of the Beneficiary as an applicant prior to the commencement of the labor certification recruitment process. We will therefore withdraw the Director's decision on the issue of *bona fide* job opportunity.

The Director also stated that the Petitioner intended to employ the Beneficiary outside the terms of the labor certification. A petitioner must be "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. It must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966). However, because the Director did not support his statement with any relevant facts or analysis, we will withdraw the Director's decision on the issue of intent to employ the Beneficiary.

Notwithstanding our withdrawal of the Director's decision, we find that the record as presently constituted contains insufficient evidence the Petitioner's continuing ability to pay the proffered wage from the priority date. We will therefore remand the matter to the Director.

III. ABILITY TO PAY

The record does not contain regulatory required evidence of the Petitioner's ability to pay the proffered wage from the priority date on February 8, 2018, and continuing until the beneficiary obtains lawful permanent residence. The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability

[2] Citing *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987) and 8 U.S.C. § 1361, the Director stated that the petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that a valid employment relationship is available to U.S. workers.

[3] The regulatory scheme governing the labor certification process is referred to by the acronym PERM, for Program Electronic Review Management.

shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The Petitioner submitted regulatory-required evidence of its ability to pay the proffered wage in 2017. However, the record does not contain regulatory-prescribed evidence of its ability to pay for 2018. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

IV. CONCLUSION

As the Director's decision did not evaluate the Petitioner's continuing ability to pay the proffered wage form the priority date, we will remand the matter to the Director for further consideration.

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 G-, Inc.*, ID# 05759190 (AAO Aug. 19, 2019)