U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10995331

Date: AUG. 31, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a dentist's office, seeks to employ the Beneficiary as a receptionist under the third-preference, immigrant category for "other workers." See Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the validity of the accompanying certification from the U.S. Department of Labor (DOL). Specifically, the labor certification identifies the Petitioner differently than the company described itself on the Form I-140.

The Petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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 an unskilled worker generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain DOL certification. 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 signifies that 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 must next submit 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. 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. VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an unskilled worker must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). A labor certification remains valid only for the particular job opportunity, foreign national, and geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). To use another employer's labor certification, a petitioner must first establish itself as a "successor-in-interest" that has acquired the rights and obligations needed to operate the employer's business or a discrete part of it. See Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481, 482-83 (Comm'r 1986).

Here, the accompanying labor certification identifies the prospective employer by a federal employer identification number (FEIN) and states the company's commencement of business in "2011." In a written request for additional evidence (RFE), however, the Director noted that the Form I-140 identifies the company by a different FEIN than listed on the labor certification and the company's federal income tax return for 2018. The RFE also notes that the Form I-140 states the Petitioner's establishment in "2013" and that commercial data indicate the company's establishment in 2008. In addition, online government information shows dissolutions of two other possible affiliates of the Petitioner.

A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988). Lacking an explanation of the inconsistent FEINs and business start dates, the record did not establish the validity of the labor certification for the job opportunity stated in the petition.

In response to the RFE, the Petitioner's chief executive officer (CEO)/sole shareholder described the FEIN and the company's establishment date on the Form I-140 as "typographical errors." The CEO/sole shareholder stated that the labor certification lists the Petitioner's correct FEIN and business start date. The Petitioner submitted an amended Form I-140 and documentation supporting the Petitioner's possession of the FEIN and business start date listed on the labor certification. The company also provided corporate information about two other dental clinics managed by the CEO/sole shareholder that have since dissolved.

The Director found the Petitioner's RFE response insufficient to resolve the discrepancies of record. The Director noted that the Petitioner did not identify the company (if any exists) whose FEIN the Petitioner listed on the Form I-140 or document the Petitioner's status as a successor-in-interest of the employer listed on the labor certification. The Director acknowledged the Petitioner's claim of typographical errors. But she noted that the original Form I-140 contains a nine-digit FEIN completely different than the Petitioner's claimed FEIN, "not a mere transposition of numbers." The Director also noted that the Form I-140 does not indicate the Petitioner's confusion of the FEINs and establishment dates of the CEO's other companies with the Petitioner's. The Director stated: "Merely providing a new copy of [the] Form I-140 petition with the same FEIN as the labor certification and a corrected incorporation date in an attempt to cure the discrepancies is not sufficient."

The Director, however, did not fully consider the Petitioner's evidence. The Petitioner's RFE response included a copy of the company's articles of incorporation stamped as received by state authorities in

2011. The response also included a copy of a letter from the U.S. Internal Revenue Service (IRS) issued before the labor certification's filing, identifying the Petitioner's FEIN as the number listed on the certification. These documents constitute "independent objective evidence" of the Petitioner's claimed establishment date and FEIN. See Matter of Ho, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies with "independent objective evidence"). A preponderance of evidence demonstrates the labor certification listing of the Petitioner's FEIN and establishment date. Thus, the labor certification refers to the job opportunity described in the petition.

The Petitioner has established itself as the prospective employer listed on the labor certification. We will therefore withdraw the Director's contrary decision. But the record still does not establish the certification's validity.

Part C.9 of the labor certification asks "is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" The Petitioner responded "No." The record, however, indicates possible family relationships between the Beneficiary and employees of the Petitioner. Documentary evidence shows that the Beneficiary and the Petitioner's CEO/sole shareholder share the same family name. In addition, the Petitioner submitted copies of payroll tax records indicating that the Beneficiary has the same family name as two additional company employees. Thus, the record indicates that the Beneficiary shares her family name with half of the Petitioner's six employees.

> 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 Containers Sys., Inc., 89-INA-228, slip op. at *7 (BALCA July 16, 1991) (en banc). The Beneficiary's possible family relationships with the Petitioner's employees cast doubt on whether the company misrepresented the availability of the offered position to U.S. workers and the relationship between the Beneficiary and the Petitioner's principal.

The Director did not inform the Petitioner of this issue. We will therefore remand the matter. On remand, the Director should issue a written notice asking the Petitioner to submit evidence of any family or personal relationships between the Beneficiary and the company's employees to determine whether the employer has a bona fide job opportunity.

III. ABILITY TO PAY THE PROFFERED WAGE

The record also does 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 residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of an annual report, federal tax return, or audited financial statements. Id.

Here, the labor certification states the proffered wage of the offered position of receptionist as $27,082 a year. The petition's priority date is June 21, 2019, the date DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d)(explaining how to determine a petition's priority date).

At the time of the decision, regulatory required evidence of the Petitioner's ability to pay the proffered wage for 2019, the year of the petition's priority date, was not yet available. The Director based her consideration of ability to pay largely on the Petitioner's federal income tax return for 2018. Thus, contrary to 8 C.F.R. § 204.5(g)(2), the record lacks copies of an annual report, federal tax return, or audited financial statements from the petition's priority date. The Petitioner therefore did not demonstrate its ability to pay the proffered wage.

On remand, in the new written notice, the Director should inform the Petitioner of the defect. The Petitioner must submit copies of an annual report, federal tax return, or audited financial statements for 2019. The Petitioner may also submit additional evidence of its ability to pay, including proof of any wages the company paid the Beneficiary that year or materials supporting the factors stated in Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

The Director should afford the Petitioner a reasonable opportunity to respond to all issues on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

V. CONCLUSION

A preponderance of evidence establishes the Petitioner as the prospective employer listed on the labor certification. But the company has not demonstrated the bona fides of the job opportunity or its ability to pay the proffered wage of the offered position from the petition's priority date onward.

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