U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12509101

Date: DEC. 21, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a landscaping worker. It requests classification of the Beneficiary as an unskilled worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This immigrant visa category 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 intended to employ the Beneficiary outside the terms of the labor certification and that it did not make a bona fide job offer.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will withdraw the decision of the Director. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration 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 certification from the U.S. Department of Labor (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 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 the 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. BONA FIDE JOB OPPORTUNITY

In this case, the accompanying labor certification was filed on July 8, 2019. The labor certification states that the offered position requires one month of experience as a landscaping worker.

After reviewing the initial submission, the Director issued a request for evidence (RFE) to establish that a bona fide job offer exists.[1] The Director noted that the accompanying labor certification states that the Petitioner advertised for the proffered job in the [redacted] Post & Courier, but that the Beneficiary resides outside the United States. The Director requested, among other things, "a statement explaining how [the Beneficiary] applied for and was selected for the position, to include how [the Petitioner] obtained [the Beneficiary's] job application … and whether and by whom [the Beneficiary] was interviewed."

The Petitioner responded to the RFE with copies of the recruitment efforts completed in support of the labor certification, and a statement from its owner. In his statement, the Petitioner's owner states that its officer manager, who signed the labor certification and I-140 petition, was responsible for the international recruitment effort, using social media and "word of mouth to promote the employment opportunity." The Petitioner's owner further states that the Beneficiary does not have any familial relationship to the company owners and shareholders, and that the Petitioner has not received compensation of any kind from the Beneficiary in return for the offered position.

After receiving the Petitioner's response to the RFE the Director denied the petition. The Director stated, "The Petitioner … did not provide documentary evidence regarding the recruitment of the Beneficiary and in support of its assertions." The Director concluded that the evidence did not show that the Petitioner made a bona fide job offer to the Beneficiary.

On appeal the Petitioner asserts that that the Director erred as a matter of law in imposing an ultra vires requirement to explain how the Beneficiary applied and was selected for the offered position. The Petitioner states that "requiring a Beneficiary to 'apply' in response to [labor certification] required recruitment … would defeat the purpose of the entire labor market test."

As the Director notes, 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. § 626.10(c)(8). While the labor certification process requires a test of the labor market, the DOL regulations do not require an employer to establish how it selected the foreign national for the job opportunity. Rather, the employer must show that there "are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers." See https://www.dol.gov/agencies/eta/foreign-labor/programs/permanent (last accessed December 14, 2020). See also 20 C.F.R. § 656.1(a). 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 outside of the required recruitment, or even its employment of the Beneficiary in the offered job, does not indicate

[1] The petitioner has the burden of establishing that a bona fide job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. See Matter of Amger Corp., 87-INA-545 (BALCA 1987); see also 8 U.S.C. § 1361; 20 C.F.R. § 656.17(l).

that the job is not open to U.S. workers. Rather, it indicates that the Petitioner followed DOL regulations in advertising for the job opportunity 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 by recruitment methods outside of those conducted for the labor certification recruitment process. The Petitioner has established that the job opportunity is bona fide. We will therefore withdraw the Director's decision on the issue of bona fide job opportunity.

III. THE BENEFICIARY'S EMPLOYMENT EXPERIENCE

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) Other documentation—
>
> > (A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Although not addressed by the Director, the Petitioner should have an opportunity to address information that casts doubt on the Beneficiary's claimed employment experience. On the labor certification, the Beneficiary claims to have been employed as a landscaper with [redacted] Home Owners Association in the Philippines from March 1, 2017 to May 29, 2017. In support of this experience, the Petitioner submitted a letter dated June 6, 2019 on [redacted] Home Owners Association letterhead. The letter is signed by [redacted] who asserts that she was the Beneficiary's supervisor during his employment.

A review of the record reveals that the Beneficiary may have a familial relationship with the author of the employment experience letter, supervisor [redacted] On the petition, the Beneficiary lists his children, who all share the middle name [redacted] If the author's letter was not properly identified as a relative, USCIS may be precluded from assessing the credibility and proper weight to be accorded to such evidence.

To be probative, a document must generally provide: (1) the nature of the affiant's relationship, if any, to the affected party; (2) the basis of the affiant's knowledge; and (3) a specific - rather than merely conclusory - statement of the asserted facts based on the affiant's personal knowledge. Matter of Chin, 14 I&N Dec. 150, 152 (BIA 1972); see also 8 C.F.R. § 103.2(b)(2)(i) (requiring affidavits in lieu of unavailable required evidence from "persons who are not parties to the petition who have direct personal knowledge of the event and circumstances"); Matter of Kwan, 14 I&N Dec. 175, 176-77 (BIA 1972); Iyamba v. INS, 244 F.3d 606, 608 (8th Cir. 2001); Dabaase v. INS, 627 F.2d 117, 119 (8th Cir. 1980). While a petitioner may submit a letter or affidavit that contains hearsay or biased information, as may be the case here, such factors will affect the weight to be accorded the evidence in an administrative proceeding. See Matter of D-R-, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Probative evidence beyond a letter or affidavit may be required to resolve inconsistencies or discrepancies in the record. See Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance

of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010).

Because we cannot affirmatively find that the Beneficiary possesses the experience required for the offered position based on the experience letter in the record, we will remand the matter to the Director for further consideration of the Petitioner's eligibility for the requested benefit. On remand, the Director may wish to issue a new RFE outlining the deficiencies above, requesting additional independent objective evidence in support, and allowing the Petitioner an opportunity to respond.

IV. ABILITY TO PAY

Although also not discussed by the Director, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage of $26,853 per year, from the priority date on July 8, 2019, 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 shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2019. 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.

We note that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. See Patel v. Johnson, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). USCIS records show that the Petitioner has filed Form I-140 petitions for 24 other beneficiaries.[2] Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.

Therefore, we will remand the matter to the Director to request additional evidence, if deemed appropriate, and analyze the record and determine whether the Petitioner has established its ability to pay the proffered wage to this Beneficiary, and the beneficiaries of its other petitions, from the priority date onward. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

V. CONCLUSION

Considering the above discussed deficiencies, we are withdrawing the Director's decision. However, the record does not demonstrate affirmatively that the Petitioner is eligible for the benefit sought, including whether the Petitioner has the ability to pay the proffered wage to the Beneficiary as required by 8 C.F.R. § 204.5(g)(2), and whether the Beneficiary meets the experience requirements as stated

[2] The Petitioner states on the accompanying labor certification that it has 150 employees; however, Part 5, Number 4, "Current Number of U.S. Employees," of Form I-140 is blank.

on the labor certification. Therefore, we will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date onward.

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