U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6962540

Date: DEC. 22, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a business operations assistant. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(B)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not demonstrate that the Petitioner had the continuing ability to pay the proffered wage from the priority date onward.

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 Director's decision and remand the matter for further proceedings consistent with our opinion and for the 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) of the Act, 8 U.S.C. § 1182(a)(5)(A). 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 id. 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 November 16, 2017. See 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY THE PROFFERED WAGE

The Director determined that the Petitioner did not establish its continuing ability to pay the proffered wage. The proffered wage is $97,406 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[2]

The record indicates that the Petitioner is a limited liability company (LLC) taxed as an S corporation. The record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward. The Petitioner's federal tax returns state net income[3] of $131,293 in 2017 and $337,843 in 2018. Therefore, for the years 2017 and 2018, the Petitioner had sufficient net income to pay the proffered wage.[4] We will therefore withdraw the Director's decision. However, for the reason discussed below, we will remand the matter to the Director.

III. BONA FIDES OF THE JOB OPPORTUNITY

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 attestation "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, at *7 (BALCA 1991) (en banc);[5] see 20 C.F.R. § 656.17(l). A relationship between a petitioner and a beneficiary triggering concerns about the bona fides of a job opportunity "is not only of the blood; it may also be financial, by marriage, or through friendship." Matter of Sunmart 374, 2000-INA-93, 2000 WL 707942, at *3 (BALCA May 15, 2000); see Matter of Chamdal Food Mart, 2000-INA-92 (BALCA May 15, 2000). Here, the Petitioner answered "No" at part C.9 of the labor certification application which asks whether there is "a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators [of the Petitioner], and the alien." The regulation at 20 C.F.R. § 656.17(l) states that if there is a familial

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[2] Federal courts have upheld our 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); Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305, 1309 (9th Cir. 1984); Estrada-Hernandez v. Holder, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); Rizvi v. Dep't of Homeland Sec., 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), aff'd, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[3] Where an LLC taxed as an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page 1 of a petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, net income is found on line 18 of Schedule K to Form 1120S. See Internal Revenue Serv., Instructions to Form 1120S, at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited Dec. 16, 2020). In this case, the Petitioner's net income is found on line 18 of Schedule K to Form 1120S. The Director erred in his determination of the Petitioner's net income in 2017 and 2018.

[4] On remand, the Petitioner must establish its continuing ability to pay the proffered wage from 2019 onward.

[5] BALCA stands for the DOL's Board of Alien Labor Certification Appeals.

relationship between the stockholders, corporate officers, incorporators, or partners, and the beneficiary, the petitioner in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity (i.e., that the job is available to all U.S. workers).[6] By signing the labor certification application, the Petitioner attested to the bona fides of the job opportunity.

However, USCIS records show that the Beneficiary appears to be related to the Petitioner's sole shareholder/President, [redacted] Specifically, it appears that [redacted]'s sister-in-law, [redacted] (a.k.a. [redacted]), is related to the Beneficiary. It does not appear that any relationship was disclosed to the DOL during the labor certification process. If the Beneficiary is related to the Petitioner's sole shareholder/President, their relationship casts doubt on the bona fides of the job opportunity.[7] Therefore, we will remand the matter to the Director to determine the bona fides of the job opportunity and whether an affected party misrepresented the position's availability to U.S. workers on the labor certification.[8] A misrepresentation of the bona fide nature of the job opportunity could also warrant invalidation of the labor certification. See 20 C.F.R. § 656.30(d) (authorizing USCIS to invalidate a labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact).

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[6] If a petitioner answers "yes" to Part C.9 of the ETA Form 9089, DOL may audit the labor certification and request the following documentation from the petitioner:

> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
> (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
> (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
> (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
> (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

20 C.F.R. § 656.17(l).

[7] The Act and the regulations authorize USCIS to further examine the availability of an offered position to U.S. workers. USCIS must "investigat[e]… the facts in each case" and determine "whether the facts stated in the petition are true." Section 204(b) of the Act, 8 U.S.C. § 1154(b). In addition, we may deny petitions accompanied by labor certifications that violate 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 the DOL regulation at 20 C.F.R. § 656.30(c)(2) where the labor certification did not remain valid for the intended geographic area of employment).

[8] A finding of willful misrepresentation of material fact against a petitioner or beneficiary requires the following elements:

- The petitioner or beneficiary procured, or sought to procure, a benefit under U.S. immigration laws;
- The petitioner or beneficiary made a false representation;
- The false representation was willfully made;
- The false representation was material; and
- The false representation was made to a U.S. government official.

See 8 USCIS Policy Manual J.2(B), https://www.uscis.gov/policymanual; see also Matter of Y-G-, 20 I&N Dec. 794 (BIA 1994); Matter of Kai Hing Hui, 15 I&N Dec. 288 (BIA 1975).

On remand, the Director should request evidence of the bona fides of the job opportunity and allow the Petitioner reasonable time to respond. Upon receipt of all of the evidence, the Director will review the entire record and enter a new decision.

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