U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29377178

Date: FEB. 02, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner seeks to employ the Beneficiary as a manager janitorial services. It requests classification of the Beneficiary under the third-preference, immigrant classification for skilled workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

After initially approving the Form I-140, Immigrant Petition for Alien Worker (petition), the Nebraska Service Center Director revoked the petition's approval. The Director concluded that the Petitioner did not demonstrate the bona fides of the job opportunity. The Petitioner appealed and we determined that the revocation of the petition's approval was not proper, as the Petitioner was not provided an opportunity to address derogatory information provided in the final revocation. We remanded the matter for further proceedings. After properly notifying the Petitioner of the derogatory information the Director again revoked the petition's approval on the same grounds. The matter is again before us on the Petitioner's appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). 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. LAW

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.

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, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). USCIS properly issues a notice of intent to revoke (NOIR) a petition if the unrebutted and unexplained record would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). The Agency properly revokes a petition's approval if a petitioner does not respond to a properly issued NOIR, or their NOIR response does not overcome all alleged revocation grounds. *Id.*at 451-52.

II. ANALYSIS

A. Procedural History

The labor certification in this case was filed on March 17, 2006 for the offered position of "Manager Janitorial Services." The job duties of the offered position as stated on the labor certification are:

> Supervision of workers to ensure clean, orderly and attractive rooms at hospitals, educational institutions and similar establishments. Assign job duties, investigate complaints regarding housekeeping service and equipment and take corretive [sic] action. May purchse [sic] housekeeping supplies and equipments. Take periodic inventories, screen applicants, train new employees and recommend dismissals.

The labor certification and the petition list the work location for the offered position as [redacted] California," and no additional work sites are listed. On the petition (in Part 6, Question 5), the Petitioner indicated that the offered position is full-time.

The Director approved the petition in 2009. After the Beneficiary attended a visa interview for consular processing, USCIS performed two site visits in 2019. First, USCIS visited the work location listed on the petition and on the labor certification. The location is a residential address and no signage for the Petitioner's business was found and no employees were identified on site. Next, USCIS visited the Petitioner's owner's home address and spoke with the Petitioner's owner. During this site visit the Petitioner's owner stated that the Petitioner had no employees, that it had three part-time contractors to provide janitorial services, and that it planned to hire employees for the Beneficiary to supervise once he arrived in the United States. The Director issued a notice of intent to revoke (NOIR) the petition's approval in January 2021, notifying the Petitioner that "because there are no regular employees to supervise, it does not appear that the job as described on the labor certification exists," and giving the Petitioner an opportunity to respond. The Director also stated that the Petitioner must demonstrate the ability to pay the Beneficiary's wage from the date it filed the petition until he attains lawful permanent resident status.

The Petitioner, a sole proprietorship, responded to the NOIR with copies of its owner's federal income tax returns and other documentation to demonstrate its business operations and continuing ability to pay the proffered wage. The Petitioner asserted that its personnel were not listed on its payroll as they were working as independent contractors, and that two of those individuals, while not direct employees, were working full-time. The Petitioner contested the allegation that it did not have personnel for the Beneficiary to supervise. The Director determined the NOIR response was not sufficient to overcome the grounds listed in the notice and it revoked the approval. The Director indicated that the Petitioner sufficiently addressed the ability to pay issue, but, relying on the tax returns, determined that "the job offered is not a bona fide position that has been available to U.S. workers." Specifically, the Director noted that the tax returns listed no wages paid to employees in 2014 and 2015, and that the wages paid in 2016 and 2017 demonstrated only part-time work. On appeal, we concluded that the Director's reliance on the tax returns in his revocation was improper, as this information was not included in the NOIR and the Petitioner was not afforded an opportunity to address these issues.

Upon remand, the Director issued a second NOIR. In the second NOIR, the Director cited the Petitioner's owner's 2014 and 2015 tax returns, noting that no wages paid and no expenses for contract labor were recorded in those years. The Director also cited the Petitioner's owner's 2016 and 2017 tax returns that reflected minimal amounts paid for contract labor. The Director stated that the offered position is supervisory in nature and the record did not demonstrate that there were employees requiring full-time supervision from 2014 through 2017. In response to the second NOIR the Petitioner submitted additional tax returns, additional Internal Revenue Service (IRS) Form 1099, Nonemployee Compensation, reflecting three contractors in 2021 and four in 2022, as well as affidavits from the Petitioner's owner's spouse and brother asserting that they each performed janitorial services for the Petitioner without being paid wages from 2014 to 2017.

The Director determined that the Petitioner did not establish that the position existed and could be filled by the Beneficiary from 2014 to 2017. The Director specifically noted that the record did not include evidence to substantiate the information in the affidavits from the Petitioner's owner's family members, or that they were considered "employees" that the Beneficiary would supervise when they provided volunteer labor. The Director again revoked the petition's approval because the Petitioner did not establish that the offered position is a bona fide job offer and remains so from the priority date until the beneficiary obtains lawful permanent residence.

B. Terms of the Labor Certification

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien entitled to immigrant classification under the Act may file a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); *see* 8 C.F.R. § 204.5(c). Such petitions must be accompanied by a labor certification from the DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5); *see also* 8 C.F.R. § 204.5(l)(3)(i). The Petitioner 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) (affirming denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary under the terms of the labor certification); s*ee also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284

(Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where the labor certification did not remain valid for the intended geographic area of employment). Because the filing of a labor certification establishes a priority date[1] for any immigrant petition later based on the labor certification, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The bona fides of the job opportunity are essential elements in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

A labor certification application must represent an offer of "[p]ermanent, full-time work." 20 C.F.R. § 656.3 (defining the term "employment"). Similarly, the requested immigrant visa classification of skilled worker requires the performance of "skilled labor (requiring at least 2 years training or experience), *not of a temporary or seasonal nature."* Section 203(b)(3)(A)(i) of the Act (emphasis added). The Petitioner also indicated on the petition that the offered position was full-time and that the only work location was the Petitioner's address at [redacted] Thus, consistent with the Act and the accompanying labor certification, the Petitioner must intend to employ the Beneficiary in the offered position of manager janitorial services on a full-time, permanent basis at the stated location on the labor certification of [redacted]

The Petitioner cannot establish the offered position as a bona fide job opportunity based solely on its stated intent to employ the Beneficiary in the offered position once he obtains lawful permanent resident status. It must provide evidence establishing the existence of a valid job offer as of the petition's priority date, i.e., it must prove that, at the time it filed the labor certification, it had existing projects on which the Beneficiary could have worked in the offered position. "In … visa petition proceedings the Service must consider the merits of the petitioner's job offer, so that a determination can be made whether the job offer is realistic …" *Matter of Great Wall*, 16 I&N Dec. at 145.

Section 204(b) of the Act allows a petition's approval only after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b). USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. §103.2(b)(i). USCIS is required to approve an employment-based immigrant visa petition only where it is determined that the facts stated in the petition, which incorporates the labor certification, are true and the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Here, we cannot conclude that the facts of the labor certification are true.

While we acknowledge the Petitioner's appellate arguments, we cannot conclude that the Petitioner is able to employ the Beneficiary in the job opportunity on a full-time basis at the work location described on the labor certification. As noted above, a labor certification is valid only for the particular job opportunity, beneficiary, and area of intended employment identified on the labor certification. *See Matter of Sunoco Energy Development Co.*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) and 20 C.F.R. § 656.30(c)(1).

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[1] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date, which in this case is March 17, 2006.

In this case the labor certification identifies the specific worksite as [redacted] No other work locations are listed. However, in the Petitioner's response to the first NOIR, the Petitioner states, "Also, there is no office supervision required for the employees, … as a Manager Janitorial Service he is only supervising employees work, so he goes to the worksite where employees are assigned with different business entities locations." The Petitioner's statement directly contradicts the information to which it attested on the labor certification, that the only work location was [redacted] However, the Petitioner was not made aware of this deficiency, nor given an opportunity to respond.

Because we cannot affirmatively find that the Petitioner has a position available to employ the Beneficiary in a permanent, full-time position at the location listed on the labor certification, we will remand the matter to the Director for further consideration. On remand, the Director should issue a new NOIR outlining the deficiencies above and allowing the Petitioner an opportunity to respond. The Director must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration. If the Director issues a new NOIR, the content of that notice and the consideration of any evidence submitted by the Petitioner should comply with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. The Director shall then issue a new decision.

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