U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13861087

Date: FEB. 16, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a food services business, seeks to employ the Beneficiary as a sandwich maker. 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.

After initially approving the petition, the Director of the Texas Service Center revoked the approval. The Director concluded that the Petitioner did not establish that the job offer was *bona fide*. The Director also found that the Petitioner willfully misrepresented a material in not disclosing a professional relationship between the Petitioner's president and the Beneficiary's spouse.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See Matter of Christo's Inc*., 26 I&N Dec. 537, 537 n.2 (AAO 2015). 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 analysis below.

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.

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 must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

II. *BONA FIDE* JOB OFFER

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).

In this case, the accompanying labor certification was filed on July 13, 2005.[1] The Petitioner in this matter is a food service business with 10 employees. The Petitioner checked "no" to question C.9 on the labor certification, "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, corporate officers, incorporators, or partners, and the alien?"

The immigrant visa petition was initially approved on March 25, 2006. The Director issued a notice of intent to revoke (NOIR) on March 2, 2020, informing the Petitioner that USCIS was in possession of adverse information. The Director stated that the adverse information identified two factors that cast doubt on whether a *bona fide* job offer exists.

First, the Director noted that another company owned by the Petitioner's president had filed separate immigrant and nonimmigrant petitions on behalf of the Beneficiary's spouse. Second, the Director noted that the Beneficiary would be one of a small number of employees. The Director stated that the existence of a professional relationship between an officer of the Petitioner and the Beneficiary (through his spouse), and the fact that the Beneficiary was one of only 10 employees, indicated that the Beneficiary may have been in a position to control or influence hiring decisions regarding the offered position.

[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.

The Petitioner responded to the NOIR with statements from the Petitioner's president, the Beneficiary, and the Beneficiary's spouse stating that no family relationship exists between them. The Petitioner and the Beneficiary also affirmed the Petitioner's offer of employment and the Beneficiary's intent to accept. The Petitioner also noted that the Beneficiary had filed Form I-485, Supplement J, Confirmation of Bona Fide Job Offer Under INA Section 204(j), confirming the Petitioner's continuing offer of employment to the Beneficiary.[2] The Petitioner provided its articles of organization; portions of its federal tax returns for 2009, 2010 and 2018; bank statements; statements from its other corporate officers; and other business documents to establish that the Beneficiary and his spouse have no ownership in the Petitioner.

Upon review of the Petitioner's response to the NOIR, the Director revoked the approval of the petition. The Director acknowledged that the documents the Petitioner submitted were "relevant to determining other facts discussed in *Matter of Modular Container System*."[3] However, he stated that the Petitioner's evidence is "not relevant to the issue at hand" because it did not address the two specific factors identified in the NOIR: 1) whether the Beneficiary's spouse was in a position to control or influence hiring decisions for the offered position, and 2) whether the Beneficiary would have such influence as one of a small number of employees. The Director found that the Petitioner did not disclose the professional relationship between its officer and the Beneficiary's spouse on the labor certification, that this information was material because it cut off a line of inquiry as to whether a *bona fide* job offer existed, and that the Petitioner willfully misrepresented this material fact on the labor certification.[4]

On appeal, the Petitioner submits evidence already provided with the NOIR response and again asserts that its job offer to the Beneficiary was *bona fide* and open and available to all U.S. workers. The Petitioner asserts that the Director erred in applying the BALCA decisions in this case because the facts are distinguishable.

Here, the Petitioner has established that it is not a closely held corporation, partnership, or sole proprietorship in which the Beneficiary has an ownership interest, and that there is no familial relationship between the Beneficiary and the Petitioner's owners, stockholders, corporate officers,

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[2] *See generally*, 8 C.F.R. § 245.25.

[3] The factors to be examined in determining whether a *bona fide* job offer exists are set forth in a decision by the Board of Alien Labor Certification Appeals in *Matter of Modular Container Systems, Inc.* 89-INA-288 (BALCA 1991). Those factors include such items as whether the beneficiary (a) is in the position to control or influence hiring decisions regarding the job for which labor certification is sought; (b) is related to the corporate directors, officers, or employees; (c) was an incorporator or founder of the company; (d) has an ownership interest in the company; (e) is involved in the management of the company; (f) is on the board of directors; (g) is one of a small number of employees; (h) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (i) is so inseparable from the sponsoring employer because of his or her persuasive presence and personal attributes that the employer would be unlikely to continue in operation without the beneficiary.

[4] To find a willful and material misrepresentation of fact an immigration officer must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

incorporators, or partners. Therefore, we will withdraw the Director's finding of willful misrepresentation.

The Director did not properly consider the Petitioner's evidence that the job opportunity is *bona fide*. The Director states that the statements of the Petitioner, the Beneficiary, the Beneficiary's spouse, and other corporate officers were afforded only "appropriate weight" because they were not supported by primary and secondary evidence to establish eligibility. However, he does not address the additional evidence, including the Petitioner's business and financial records, submitted as primary evidence demonstrating that the Beneficiary and his spouse do not have a familial relationship with the Petitioner's owners, or that neither the Beneficiary nor his spouse are in positions to control or influence hiring decisions. Rather, the Director concludes that the statements "may provide contextual information regarding their relationship with the [Petitioner's president], but *it cannot prove* that [the Petitioner's president] did not know that the two were husband and wife at the time the labor certification was filed." (Emphasis added).

The Director here appears to impose a requirement that the Petitioner establish that its President was not acquainted with the Beneficiary prior to the filing of the labor certification. 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 or why 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 February 4, 2021). *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 president's existing personal association with the Beneficiary through his spouse does not indicate that the job was not open to U.S. workers. What is relevant, however, is 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 president's employment of the Beneficiary's spouse in another company. The Petitioner has established by a preponderance of the evidence that the job opportunity is *bona fide*. We will therefore withdraw the Director's decision on the issue of *bona fide* job opportunity and material misrepresentation.

III. ELIGIBILITY FOR IMMIGRANT CLASSIFICATION

Although the Petitioner has established by a preponderance of the evidence that its job offer is *bona fide*, we cannot not affirmatively find that the Petitioner has established eligibility for the requested benefit in other respects.

A. The Petitioner as Employer

An employer may petition for a foreign national if it is "desiring and intending to employ [him or her] within the United States." Section 204(a)(1)(F) of the Act. For labor certification purposes, the term "employer" also means a person or company "which proposes to employ a full-time worker at a place within in the United States." 20 C.F.R. § 656.3.

We note that the Petitioner filed the accompanying labor certification listing Federal Employer Identification Number (FEIN) [redacted]. The Petitioner later filed the petition listing FEIN [redacted]. The supporting documents submitted with the petition and on appeal include the Petitioner's federal tax returns for FEIN [redacted], as well as Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, issued to the Beneficiary from FEIN [redacted]. The record does not include supporting documents for any business with FEIN [redacted], the entity that filed the labor certification.

The record includes a statement from the Petitioner's president stating that he is an entrepreneur, owning and managing numerous sandwich, pizza and liquor stores. A search of public records indicates that the business associated with FEIN [redacted] is [redacted], another sandwich shop owned by the Petitioner's president. That business was forfeited in 2008 for failure to pay its 2007 property return.[5]

Here, the Petitioner is a different entity from the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). The Petitioner has not asserted that it is a successor to the labor certification employer.

Because we cannot affirmatively find that the Petitioner and the labor certification employer are the same entity, we will remand the matter to the Director for further consideration. On remand, the Director may wish to issue a new NOIR outlining the deficiencies above, requesting additional independent objective evidence in support, and allowing the Petitioner an opportunity to respond.

B. The Beneficiary's Qualifications

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the accompanying labor certification states that the offered position of sandwich maker requires a high school or foreign equivalent diploma. The labor certification states that the Beneficiary completed a general studies high school education in India in 1990. However, the record does not

[5] *See Maryland Business Express*, https://egov.maryland.gov/BusinessExpress/EntitySearch/Business (last visited February 2, 2021).

include evidence demonstrating the Beneficiary's possession of a high school or foreign equivalent diploma.

Because we cannot affirmatively find that the Beneficiary possesses the education required for the offered position, we will remand the matter to the Director for further consideration. On remand, the Director may wish to issue a new NOIR outlining the deficiencies above, requesting additional independent objective evidence in support, and allowing the Petitioner an opportunity to respond.

C. Ability to Pay

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-required evidence of the Petitioner's ability to pay the proffered wage of $6.85 per hour, from the priority date on July 13, 2005, and continuing until the beneficiary obtains lawful permanent residence.

In order to determine the Petitioner's ability to pay the proffered wage, we first must determine whether the Petitioner can establish that it is the successor-in-interest to the entity that filed the labor certification. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481. Specifically, the record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2005, the year of the priority date, or complete copies of its tax returns for subsequent years. Further, the tax returns in the record are for the Petitioner, the entity with FEIN [redacted] which is not the same entity as the labor certification employer. If the Petitioner is a successor to the labor certification employer, it must establish eligibility for the immigrant visa in all respects, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. *Id.* at 482. 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 one other beneficiary. 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.

IV. 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 can establish that it is the successor-in-interest to the entity that filed the labor certification, that it 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 education requirement as stated on the labor certification. Therefore, we will remand this case to the Director for further consideration of the Petitioner's eligibility for the requested benefit.

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