U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U-S-, INC.

DATE: FEB. 28, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an importer, fabricator, and installer of natural stones, seeks to employ the Beneficiary as a stone fabrication technician. It requests classification as a skilled worker under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This category allows a U.S. business to sponsor a foreign national with at least 2 years of training or experience for lawful permanent resident status.

After initially approving the petition, the Director, Texas Service Center, revoked its approval. *See* section 205 of the Act, 8 U.S.C. § 1155 (authorizing U.S. Citizenship and Immigration Services (USCIS) to revoke a petition's approval "at any time" for "good and sufficient cause"). The Director concluded that the Petitioner did not disclose a familial relationship between the Petitioner's president and the Beneficiary on the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification). The Director also found that the record at the time of the petition's approval did not establish the Petitioner's intention to employ the Beneficiary in the offered position.

We dismissed the Petitioner's appeal, finding that although the familial relationship between the Petitioner's president and Beneficiary did not affect the *bona fide* nature of the job, the record did not establish the Petitioner's intention to employ the Beneficiary in the offered position. *See Matter of U-S-, Inc.*, ID# 16144 (AAO) Mar. 25, 2016). We subsequently denied the Petitioner's following motions to reopen and reconsider. *See Matter of U-S-, Inc.*, ID# 8597 (AAO July 13, 2016).

The matter is now before us again on motion to reopen and motion reconsider. Upon review, we will grant the motion to reopen and remand this matter to the Director for further proceedings consistent with the following opinion and for the entry of a new decision.

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must meet the formal filing requirements (such as, for instance, submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1).

A motion to reopen is based on factual grounds and must (1) state the new facts to be provided in the reopened proceeding; and (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider is based on legal grounds and must (1) state the reasons for reconsideration; (2) be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy; and (3) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

II. ANALYSIS

A. Motion to Reopen

The Petitioner meets the requirements for a motion to reopen. Specifically, the Petitioner has provided evidence to overcome our appellate decision finding that the Petitioner did not intend to employ the Beneficiary. The Petitioner's prior motion to reopen contained an affidavit from the Petitioner's president explaining the Beneficiary's role in the company and stating its intention to employ him in the offered position. This affidavit overcomes the evidence suggesting the Petitioner's intention to employ the Beneficiary in a different position. We will therefore grant the Petitioner's motion to reopen and withdraw our appellate finding regarding the *bona fides* of the job offer.

Despite our withdrawal of the appeal's dismissal ground, the record does not establish the petition's initial approvability. As indicated in our appellate decision, the record at the time of the petition's approval did not demonstrate the Petitioner's ability to pay the proffered wage of $49,525 per year.

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 include copies of annual reports, federal income tax returns, or audited financial statements. *Id.* Here, USCIS records indicate the Petitioner's filing of three other Forms I-140, Immigrant Petitions for Alien Workers, that remained pending at the time of this petition's approval on December 19, 2011.[1]

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files. 8 C.F.R. § 204.5(g)(2). The Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this petition and other petitions that remained pending at that time. The Petitioner must demonstrate its ability to pay the combined proffered wages from this petition's priority date until the beneficiaries of the other petitions obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our denial of a petition where a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries).

[1] USCIS records identify the three other petitions by the following receipt numbers: [redacted] and [redacted]

With its prior motion to reopen, the Petitioner submitted information and documentation in support of its ability to pay its pending beneficiaries, but such evidence has not been considered by the Director. We will therefore remand this matter to the Director for consideration of the Petitioner's ability to pay the proffered wage at the time of the petition's approval.

If the Director concludes that the record establishes the Petitioner's ability to pay the proffered wages of all pending beneficiaries at the time of the petition's approval, he should notify the Petitioner of the continued validity of this petition. However, if the Director does not so find, he may issue a new notice of intent to revoke (NOIR) pursuant to 8 C.F.R. § 205.2(b). A new NOIR may also allege any other revocation grounds supported by good and just cause.

B. Motion to Reconsider

As we are granting the motion to reopen and remanding the matter to the Director for entry of a new decision, the motion to reconsider is moot.

III. CONCLUSION

We will grant the Petitioner's motion to reopen and withdraw our contrary appellate finding. However, because the record does not establish the Petitioner's ability to pay the proffered wage at the time of the petition's approval, we will remand this matter to the Director for further consideration.

ORDER: The motion to reopen is granted and the matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of U-S-, Inc.*, ID# 87886 (AAO Feb. 28, 2017)