U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12210826

Date: JAN. 5, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a healthcare staffing business, seeks to employ the Beneficiary as a registered nurse under the third-preference, immigrant visa classification for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not establish compliance of its accompanying application for Schedule A designation with regulations of the U.S. Department of Labor (DOL).

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* 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 entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker usually follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer generally must obtain DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). If DOL approves a position, an employer next submits the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS grants a petition, a foreign national may apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

DOL, however, has already determined that the United States lacks registered nurses and that employment of foreign nationals in these "Schedule A" positions will not harm the wages or working conditions of U.S. workers in similar positions. 20 C.F.R. § 656.5. DOL therefore does not require employers to advertise registered nursing positions to U.S. workers in the general population and has authorized USCIS to adjudicate Schedule A labor certification applications for registered nurses in petition proceedings. 20 C.F.R. § 656.15(a). Thus, in this matter, USCIS rules not only on the petition, but also on its accompanying labor certification application. *See* 20 C.F.R. § 656.15(e) (describing USCIS' Schedule A labor certification determinations as "conclusive and final").

II. THE SCHEDULE A APPLICATION

Unless accompanied by documentation of a beneficiary's qualifications for a shortage position or an individual labor certification approved by DOL, a skilled-worker petition must include an application for Schedule A designation. 8 C.F.R. § 204.5(l)(3)(i). Prospective employers seeking Schedule A designation must comply with notice of filing requirements. 20 C.F.R. § 656.15(b)(2). For non-union positions, employers must post notices of their Schedule A applications for at least 10 consecutive business days at corresponding worksites, between 30 and 180 days before filing the applications. 20 C.F.R. § 656.10(d)(3)(iv).

> If the employer does not know where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) of all of its current clients, and publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage will be derived from the area of the staffing agencies' headquarters.

DOL, OFLC [Office of Foreign Labor Certification] Frequently Asked Questions, "Notices of Filing," No. 12, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited Jan. 4, 2021).

Here, the Petitioner stated that it had not yet determined where the Beneficiary would work in the United States as a registered nurse. Pursuant to the guidance on DOL's website, the Petitioner provided copies of notices posted at 127 U.S. client sites where it could potentially place him.

The Petitioner filed its petition and accompanying Schedule A application on August 30, 2019. The Petitioner therefore had to complete the postings by July 30, 2019, 30 days before the filing of the petition and the Schedule A application. The Director noted that one of the 127 posting notices submitted by the Petitioner omits the year in which its posting ended. The notice states its posting from "06/06/19" to "06/21/." The notice initially stated its removal from posting on "6/17/19." But that date has a line drawn through it. The date "06/21/" is written next to it. The Director stated: "The removal date of the notice of filing did not include a year. USCIS is therefore unable to determine an accurate removal date of the posted notice." Without issuing a written request for additional evidence (RFE) or a notice of intent to deny (NOID) the petition, the Director denied the filing, finding that the Petitioner did not establish its posting of all notices at least 30 days before the petition's filing. *See* 20 C.F.R. § 656.10(d)(3)(iv).

The removal date of "06/21" on the posting notice, however, would have made sense only if the notice had been removed in 2019. The notice could not have been removed in the years before its placement. Also, because a copy of the notice was filed with the petition on August 30, 2019, the notice could not have been removed in 2020 or a later year. Thus, logic suggests the notice's removal in 2019.

Also, on appeal, the Petitioner submits another copy of the posting notice showing a removal date of "06/21/19." The Petitioner explains that the originally submitted photocopy inadvertently "cut off" the year on the end of the notice's removal date. The new photocopy of the notice, positioned more to the left than the original copy, shows the notice's complete removal date as "06/21/19." The

Petitioner also submits an affidavit from the person who posted the notice, confirming the posting dates from "06/06/19" to "06/21/19."

Where a petitioner received a notice questioning its evidence and a reasonable opportunity to explain, we do not accept additional evidence and explanations on appeal. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). Here, however, the Director denied the petition without first issuing an RFE or NOID. The Petitioner therefore did not receive an opportunity to explain its evidence and confirm its compliance with DOL posting requirements. We will therefore accept the evidence on appeal.

The Petitioner has demonstrated its compliance with DOL posting notice requirements. We will therefore withdraw the Director's contrary decision.

III. THE EDUCATIONAL REQUIREMENTS

The appeal overcomes the petition's denial ground. But the record does not establish the filing's approvability. The Petitioner has not demonstrated the Beneficiary's qualifications for the offered position or the requested immigrant visa classification.

A position for a skilled worker must generally require at least two years of training or employment experience. Section 203(b)(3)(A)(i) of the Act. For these purposes, however, "[r]elevant post-secondary education" counts as training. 8 C.F.R. § 204.5(l)(2) (defining the term "skilled worker").

A petitioner must also demonstrate a beneficiary's possession of all job requirements listed on a labor certification application by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification application to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983).

Here, the Petitioner's Schedule A application states the minimum requirements of the offered position of registered nurse as a U.S. associate's degree, or a foreign equivalent degree, in nursing. The application indicates that the position requires neither training nor experience.[2]

On the Schedule A application, the Beneficiary attested that, by the petition's priority date, an Indian institute awarded him an associate's degree in nursing. The Petitioner submitted copies of the Beneficiary's diploma in "general nursing and midwifery" and a transcript indicating his completion of the three-year program.

The record, however, lacks evidence of the Indian diploma's U.S. equivalency. Thus, contrary to the requirements of the offered position listed on the Schedule A application, the Petitioner has not demonstrated the Beneficiary's possession of the foreign equivalent of a U.S. associate's degree.

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[1] This petition's priority date is August 30, 2019, the date of its filing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] The application also states the position's requirement of passage of the National Council Licensure Examination for Registered Nurses (NCLEX), a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), or a license in the state of intended employment. The Beneficiary's qualifications for this requirement are not at issue.

The Director did not notify the Petitioner of this evidentiary deficiency. We will therefore remand the matter. On remand, the Director should notify the Petitioner why its evidence does not demonstrate the Beneficiary's educational qualifications for the offered position.

IV. ABILITY TO PAY THE PROFFERED WAGE

The record also does not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay, 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 generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the Schedule A application states the proffered wage of the offered position of registered nurse as $28.76 an hour, or $59,820.80 a year based on a 40-hour work week.[3] As previously noted, the petition's priority date is August 30, 2019.

At the time of the petition's filing, regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2019, the year of the petition's priority date, was unavailable. Contrary to 8 C.F.R. § 204.5(g)(2), the record therefore did not establish the company's ability to pay "at the time the priority date is established." The Director determined the company's ability to pay based on its audited financial statements for 2017 and 2018.

Regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2019 should now be available. On remand, the Director therefore should also notify the Petitioner that it must provide copies of annual reports, federal tax returns, or audited financial statements for 2019 and, if available, 2020. The Petitioner must demonstrate its ability to pay the combined proffered wages of this and other Form I-140 petitions that were pending or approved as of this petition's priority date, or filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming a petitioner's responsibility to demonstrate its ability to pay the combined proffered wages of multiple beneficiaries). The Petitioner may also submit additional evidence of its ability to pay, including proof that it paid the Beneficiary wages in 2019 and 2020, or materials supporting the factors indicated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

The Director should provide the Petitioner with a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision

[3] A Schedule A petitioner must obtain a prevailing wage determination for an offered position from DOL. 20 C.F.R. § 656.15(b)(1). A petitioner must attest that the proffered wage equals or exceeds the prevailing wage and that the wage the petitioner would pay a beneficiary to begin work would equal or exceed the prevailing wage. 20 C.F.R. § 656.10(c)(1); *see also* 20 C.F.R. § 656.10(a)(3) (stating that Schedule A employers must comply with the provisions of 20 C.F.R. § 656.10). Here, a copy of the DOL prevailing wage determination sets the prevailing wage at $59,821 a year, slightly above the annual proffered wage.

V. CONCLUSION

The record establishes the Petitioner's compliance with DOL posting-notice requirements. The Petitioner, however, has not demonstrated the Beneficiary's educational qualifications for the offered position or the company's ability to pay the proffered wage.

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