U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6896575

Date: JAN. 10, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as an assistant manager of a service station. The company requests his classification under the third-preference, immigrant category for "other workers." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

The Director of the Texas Service Center denied the petition. The matter is before us on the Petitioner's appeal.

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. THE DENIAL GROUND

An adverse decision must "explain in writing the specific reasons for denial." 8 C.F.R. § 103.3(a)(1)(i). Here, the Director appears to have found that the Beneficiary willfully misrepresented his possession of the minimum employment experience required for the offered position.[1] But the written decision also states that "the petitioner has not established eligibility for the benefit sought." Thus, the decision does not specify whether the denial stems from the Beneficiary's alleged misrepresentation, the Petitioner's purported inability to establish his qualifying experience for the position, or both. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision.

If the Director bases his new decision on the alleged misrepresentation, the misrepresentation finding here alone would not warrant the petition's denial. A foreign national's misrepresentation of a material fact in a request for an immigration benefit renders him or her inadmissible to the United States. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1158(a)(6)(C)(i). An I-140 petitioner, however, need not establish a beneficiary's admissibility. Rather, the Act authorizes officers of the

[1] As the Petitioner notes, however, the decision also states that U.S. Citizenship and Immigration Services (USCIS) "intends to enter a finding of willful misrepresentation of a material fact against the petitioner," rather than the Beneficiary.

U.S. Departments of State and Homeland Security to make admissibility findings on applications for: immigrant visas at consulates, *see* section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A); admissions at ports of entry, *see* section 202(a)(1)(B) of the Act, 8 U.S.C. § 1152(a)(1)(B); and adjustments of status at USCIS offices, *see* section 245 of the Act, 8 U.S.C. § 1255. Thus, these I-140 petition proceedings are not the appropriate forum to determine the Beneficiary's admissibility. *See Matter of O-*, 8 I&N Dec. 295, 296-98 (BIA 1959). Nor would a finding of his inadmissibility warrant the I-140 petition's denial.

An I-140 petition denial can stem from a misrepresentation of a material fact involving a labor certification application. USCIS may invalidate a labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact involving the certification. 20 C.F.R. § 656.30(d). A petition for an unskilled worker generally requires a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). Thus, a beneficiary's misrepresentation of a material fact on a labor certification can lead to a petition's denial for lack of a valid certification. But a director should cite the appropriate regulations and must explain that the denial stems from the petition's lack of a valid labor certification.

If the Director's new decision denies the petition based on the Beneficiary's experience qualifications, the Director must clearly state that the record does not establish the Beneficiary's possession of the minimum experience required for the offered position and should identify whether the Beneficiary misrepresented his experience. The Director must also consider the Petitioner's evidence of the Beneficiary's claimed experience and explain why it is insufficient.

The Director's decision does not clearly state the reasons for denial. We will therefore withdraw the decision and remand the matter for entry of a new decision.

II. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, 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 a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). For petitioners employing less than 100 people, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the accompanying labor certification states the proffered wage of the offered position of assistant manager as $49,296 a year. The petition's priority date is September 22, 2017, the date the U.S. Department of Labor received the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner submitted a copy of its federal income tax return for 2016. The record, however, lacks required evidence of the Petitioner's ability to pay the proffered wage in 2017, the year of the petition's priority date, or thereafter. Contrary to 8 C.F.R. § 204.5(g)(2), the Petitioner therefore has not demonstrated its ability to pay the proffered wage from the petition's priority date onward.

Also, USCIS records indicate the Petitioner's filing of an immigrant petition for another beneficiary after this petition's priority date of September 22, 2017.[2] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and the other petition that was filed after September 22, 2017. *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, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).

The record lacks information about the Petitioner's other petition. USCIS therefore cannot determine the total proffered wages that the Petitioner must demonstrate its ability to pay. On remand, the Director should notify the Petitioner that it must provide the proffered wage and priority date of its other petition. The Director should also ask the Petitioner to submit copies of its annual reports, federal tax returns, or audited financial statements for 2017, 2018, and, if available, 2019. The Petitioner may also submit additional evidence of its ability to pay the combined proffered wages in those years, including proof of any wages it paid the beneficiaries or materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

The Director should afford the Petitioner a reasonable period to gather and submit requested evidence. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

The decision does not clearly state the reasons for denial. The record also lacks required evidence of the Petitioner's ability to pay the proffered wage from the petition's priority date onward.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis. The Director should certify any adverse decision to the Administrative Appeals Office for review.

[2] The other petition's receipt number is [redacted]