U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16226059

Date: JAN. 13, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, an ATM business supplies and equipment company, seeks to employ the Beneficiary as a computer data examiner. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(B)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center initially approved the petition, but subsequently revoked the approval. In his revocation decision the Director determined that the proffered position was not a *bona fide* job offer open to U.S. workers because the Petitioner had offered the job to the Beneficiary before advertising the position. The Director also found that the Petitioner willfully misrepresented a material fact on the labor certification by declaring that the proffered position was a job opportunity open to any U.S. worker, and invalidated the labor certification on that basis.

On appeal the Petitioner asserts that it followed proper procedures, including advertising for the proffered position, during the labor certification process, that its intent to employ the Beneficiary was consistent with this process, and that it did not misrepresent any material fact in declaring on the labor certification that the proffered position was open to any U.S. worker.

The 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 Director's decision and remand the case to the Director for further consideration and the issuance of a new decision. It is the Beneficiary's burden in these proceedings to establish eligibility for the requested benefit by a preponderance of the evidence. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section

212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition (Form I-140) with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may 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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the petition's approval, 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. ANALYSIS

The I-140 petition was filed on June 1, 2017, accompanied by a labor certification that was filed with the DOL on May 24, 2016, and certified in December 2016. The petition was initially approved on June 12, 2017. However, the Director issued a NOIR in August 2019 and, after receiving the Petitioner's response to the NOIR, revoked the petition's approval on May 15, 2020.

A. Revocation Issues

In the revocation decision the Director discussed a consular office interview of the Beneficiary in which the Beneficiary indicated that the Petitioner's president, [redacted] whom she described as an old friend but not a familial relation, traveled to Pakistan in 2015 and offered her a job as "computer operator" in his company. Since this "job offer" preceded advertisements for the computer data examiner position in the United States, which commenced in January 2016, the Director concluded that the proffered position was not a *bona fide* job offer available to all qualified applicants in the United States and, furthermore, that the ETA Form 9089 would not have been certified if the DOL had been presented with all the facts. The Director also found that the Petitioner willfully misrepresented that the job was open to any U.S. worker, which was material to the Beneficiary's eligibility for the requested immigration benefit, by signing the Employer Declaration in section N of the labor certification, which included the certifications at N.8 that "[t]he job opportunity has been and is clearly open to any U.S. worker" and at N.9 that "[t]he U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons." Based on this finding that the Petitioner

willfully misrepresented a material fact on the ETA Form 9089, the Director invalidated the labor certification.

We do not agree with the Director's rationale for revoking the petition's approval and invalidating the labor certification. 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 identification of the Beneficiary prior to the required recruitment, or even its employment of the Beneficiary in the offered job, does not indicate that the job is not open to U.S. workers. Rather, it indicates 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.

[redacted]'s meeting with the Beneficiary in 2015 and prospective offer of employment does not appear to have violated any aspect of the labor certification process that followed. While the prospective job offer in 2015 certainly manifested the Petitioner's intent to employ the Beneficiary in the job of computer data examiner, the intent to employ a foreign national in a particular job precedes every labor certification application and associated employment-based immigrant petition filed by a U.S. employer. The record indicates that the Petitioner advertised the proffered position in the United States in accordance with the requirements of the labor certification process. In its appeal brief the Petitioner states that it was audited during the labor certification process and submitted "Response to Audit" documentation to the DOL on October 18, 2016. Two months later the labor certification application was approved by the DOL, which the Petitioner cites as proof of the DOL's satisfaction that the proffered position was a *bona fide* job offer open to U.S. workers.

Following our review of the record, we will withdraw the Director's revocation decision and the Director's finding that the Petitioner willfully misrepresented a material fact by declaring on the labor certification that the proffered position was open to any U.S. worker. We also note that the Director acknowledged in the revocation decision that the Beneficiary has no familial relationship to the Petitioner's president and his wife, who are the Petitioner's co-owners, and that the Beneficiary is not a founder or incorporator of the Petitioner.

However, we cannot affirmatively conclude that the Petitioner has established eligibility for the requested benefit because there are additional requirements that the Director did not discuss for which documentary evidence is not complete. Accordingly, we will remand this case to the Director to address the following issues.

B. Labor Certification Requirements and the Beneficiary's Qualifications

To be eligible for a requested visa classification, a petitioner must establish that the beneficiary meets the requirements of the labor certification. More specifically to the instant petition, the regulation at 8 C.F.R. § 204.5((l)(3)(ii)(D) provides that:

> If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

All labor certification requirements must be met by the priority date of the petition,[1] which in this case is May 24, 2016. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

The labor certification accompanying the instant I-140 petition requires an associate's degree in business or a foreign educational equivalent and six months of experience as a computer data examiner or computer operator. The Petitioner asserts that the Beneficiary met these requirements by virtue of a bachelor's degree in business administration and commerce in 2005 from the University [redacted] in Pakistan, and employment as a computer operator and administrative assistant at [redacted] Nursing Home in [redacted] starting on July 1, 2015, and ongoing at the time the labor certification application was filed in May 2016.

As evidence of the Beneficiary's education the record includes an evaluation of the Beneficiary's academic credentials from Morningside Evaluations, dated September 30, 2016, which asserts that the Beneficiary earned a two-year bachelor of commerce in 2003 (not 2005) at the University [redacted] Pakistan, and that this degree is equivalent to an associate's degree in business administration from a U.S. college or university. However, no copy of the Beneficiary's academic record (diploma and/or transcripts) from the University [redacted] has been submitted to verify the alleged academic credential. Absent any documentation from the university itself, the Petitioner has not established the Beneficiary meets the educational requirement of the labor certification. On remand, therefore, the Director should request that the Petitioner submit a copy of the Beneficiary's bachelor of commerce diploma and transcripts from the University [redacted] as evidence that the Beneficiary has the required education to meet the terms of the labor certification.

As evidence of the Beneficiary's experience the record includes a letter from [redacted] Chairman of [redacted] Nursing Home in [redacted] Pakistan, dated January 22, 2016, stating that the Beneficiary had been employed since July 1, 2015, as a computer operator and administrative assistant,[2] and describing her job duties. The letter did not specify what percentage of the Applicant's time was spent performing the duties of a computer operator, which would be qualifying experience, and what percentage of the Applicant's time was spent performing the duties of an administrative assistant, which would not be qualifying experience. On remand, therefore, the Director should determine whether the employment verification letter establishes that the Beneficiary met the experience requirement of the labor certification based on her work at the nursing home, or whether additional evidence is needed that the Beneficiary gained at least six months of qualifying experience with that employer by the priority date of May 24, 2016.

C. Petitioner's Ability to Pay the Proffered Wage

To be eligible for a requested visa classification, a petitioner must also establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

[1] The "priority date" of an employment-based immigrant petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

[2] The job of administrative assistant is not identified as qualifying experience on the labor certification.

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

In this case the proffered wage is $37,398 per year and the priority date is May 24, 2016. Thus, the Petitioner must establish its continuing ability to pay the proffered wage as of May 24, 2016.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

In this case there is no evidence that the Petitioner has ever employed the Beneficiary. Therefore, the Petitioner has not established its ability to pay the proffered wage as of the priority date, May 24, 2016, based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

With its initial evidence the Petitioner submitted a copy of its federal income tax return (Form 1120S, U.S. Income Tax Return for an S Corporation) for 2015, which may have been the Petitioner's most recent return at the time the instant petition was filed and initially approved in June 2017. Since the priority date of the petition is in 2016, however, that is the first year for which the Petitioner must demonstrate its ability to pay the proffered wage. Without a copy of the Petitioner's 2016 federal tax return (or an annual report or audited financial statement for 2016), and similar documentation for subsequent years, we are unable to determine the Petitioner's ability to pay the proffered wage based on its net income or net current assets from the priority date of May 24, 2016, onward.

On remand, therefore the Director should request copies of regulatory required evidence of the Petitioner's ability to pay the proffered wage – in the form of federal tax returns, or audited financial statements, or annual reports, as specified in 8 C.F.R. § 204.5(g)(2) – for 2016 and subsequent years.

III. CONCLUSION

For the reasons discussed above, we will withdraw the Director's decision and remand the case for further consideration of the Beneficiary's educational and experience qualifications, the Petitioner's ability to pay the proffered wage, and any other issue(s) the Director may deem relevant. The Director shall issue a new NOIR and request additional evidence from the Petitioner. Following the Petitioner's response thereto, or the expiration of the time period to respond, the Director shall issue a new decision. The Petitioner bears the burden of proof to demonstrate eligibility for the requested immigration benefit by a preponderance of the evidence. *See* section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

ORDER: The Director's decision is withdrawn. The matter is remanded for further consideration in accord with the foregoing analysis and the entry of a new decision.