U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31389680

Date: JUL. 05, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a convenience store, seeks to employ the Beneficiary as a bookkeeper. It requests his classification as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that it has a bona fide job opportunity that is open to any U.S. worker.[1] The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). While we conduct de novo review on appeal, *Matter of Christo's, Inc.,* 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that a remand is warranted in this case because the Director's decision is insufficient for review. Specifically, the decision lacks any discussion of the Petitioner's response to a notice of intent to deny (NOID). Accordingly, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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

[1] The Director initially denied the petition on July 25, 2019, concluding the Petitioner did not demonstrate that the Beneficiary met the minimum experience requirements stated on the labor certification and therefore did not establish that he is qualified for the offered position. The Petitioner filed a timely combined motion to reopen and reconsider that decision on Form I-290B, Notice of Appeal or Motion [redacted] The Director subsequently issued a notice of intent to deny on March 9, 2023, and, on October 6, 2023, issued the decision that is now before us on appeal.

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 beneficiary 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.

II. ANALYSIS

At issue in this case is whether the Petitioner established that there is a bona fide job opportunity that was open and available to U.S. workers. For the reasons discussed below, we will withdraw the Director's decision and remand the matter for further consideration and entry of a new decision.

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. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a bona fide job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, at 7 (BALCA 1991) (en banc); *see* 20 C.F.R. § 656.17(l).

In both the notice of intent to deny (NOID) issued on March 9, 2023, and in the decision denying the petition, the Director addressed the existence of a friendship between the Petitioner's owner and the Beneficiary's maternal uncle. The Director, citing *Matter of Sunmart*, 00-INA-93 (BALCA May 15, 2020), emphasized that "a relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." The Director determined that "the beneficiary's relationship to the petitioner, the small number of employees, and the discrepancies found regarding the place of employment calls into question the true availability of the position to all U.S. workers" and concluded that the Petitioner did not establish that it made a bona fide job offer.

On appeal, the Petitioner emphasizes that Director's decision makes no reference to the evidence and arguments it provided in its response to the NOID, noting that the denial is "in all substantive matters identical to the Notice of Intent to Deny." The Petitioner reiterates its contention that the Beneficiary has no personal relationship with its owner. In addition, it maintains that even if the record demonstrated that such relationship existed, the Director failed to conduct a "totality of the circumstances" test, and "failed to consider all the factors which weigh in favor of finding that a bona fide job opportunity exists." Finally, the Petitioner maintains the Director erroneously stated that it has a "small number of employees" and failed to explain the "discrepancies found regarding the place of employment."

The Petitioner's assertions are persuasive. The Director's failure to acknowledge the Petitioner's response to the NOID was clearly in error. An officer must explain the specific reasons for denying a visa petition. *See* 8 C.F.R. § 103.3(a)(i). This explanation should be sufficient to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See, e.g. Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). Because the Director did not address the Petitioner's response to the NOID, the decision did not adequately explain why the evidence was insufficient to establish eligibility.

Further, as emphasized by the Petitioner, even if the record established a friendship or other close personal relationship between the Beneficiary and the Petitioner's owner, it would represent only one factor to be considered among multiple other factors when determining whether it made a bona fide job offer. These other factors include, but are not limited to, whether a noncitizen: is in a position to control or influence hiring decisions regarding the offered position; incorporated or founded the company; has an ownership interest in the company; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; has qualifications matching specialized or unusual job duties or requirements stated in the labor certification; and is so inseparable from the sponsoring employer because of his or her pervasive presence that the employer would be unlikely to continue in operation without the noncitizen. *Matter of Modular Container Sys., Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*).

The Petitioner addressed these factors in its response to the NOID and they were not given due consideration in the Director's decision. Further, we agree with the Petitioner that the Director did not adequately explain their determination that the Petitioner has a small number of employees and that there were "discrepancies" regarding the Beneficiary's place of employment. We will not make a totality of the circumstances determination regarding the bona fides of the job offer here, in the first instance, as that is in the Director's purview.

Finally, the procedural history of this case leaves open the question of whether the Petitioner resolved the grounds of ineligibility as stated in the initial notice of denial dated July 19, 2019. The Director initially denied the petition after determining that the Petitioner did not establish that the Beneficiary had at least two years of work experience, which is the minimum requirement stated on the labor certification. As noted, the Petitioner filed a timely combined motion to reopen and reconsider that decision. While the Director subsequently issued a new NOID in March 2023, neither the NOID nor the October 6, 2023, decision addresses the previous denial or includes an affirmative finding that the Petitioner's motion overcame the original basis for denial. The Director is therefore instructed to address this unresolved issue on remand.

III. CONCLUSION

For the reasons discussed above, we will remand this case for further consideration of whether the Petitioner and the Beneficiary meet all eligibility requirements, including, but not limited to, whether there is a bona fide job offer and whether the Beneficiary meets the requirements for the offered position. After further consideration of the issues addressed in this decision, the Director may issue a new NOID, in accordance with the applicable provisions at 8 C.F.R. § 103.2(b)(8) and 103.2(b)(16)(i), prior to issuing a new decision.

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