U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-S- LLC

DATE: JULY 22, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of healthcare staff to hospitals, clinics, and managed care organizations, seeks to employ the Beneficiary as a registered nurse. It requests her classification under the third-preference, immigrant category as a skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the *bona fides* of the job offer.

On appeal, the Petitioner submits additional evidence. The Petitioner asserts that the Director erred by basing her conclusion on a finding that the Beneficiary would work at the company's office, rather than at a client site.

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 typically follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer seeks certification from the U.S. Department of Labor (DOL). *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 must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. If USCIS grants a petition, a foreign national may finally 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 sufficient nurses and that employment of foreign nationals in these "Schedule A" positions will not harm the wages or working conditions of U.S. nurses. 20 C.F.R. § 656.5. DOL therefore authorizes USCIS to adjudicate labor certification applications in petition proceedings for Schedule A nurses. 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.

II. THE BONA FIDES OF THE JOB OFFER

As noted, the Director denied the petition finding that the Petitioner has not demonstrated that the job offer was *bona fide*. The Director's concerns appear to focus on two areas: the position's worksite and the employment conditions. The Director found that the Petitioner intends to employ the Beneficiary at its headquarters, but noted that the Petitioner did not demonstrate that its headquarters includes a healthcare facility where a nurse would work. However, the decision also states that the Petitioner intends to "contract out" its employees to work at client sites, and that because the Beneficiary would be contracted out, the Petitioner must show "when, where, and how" employees would perform their duties.

USCIS must explain in writing the specific reasons for denying a benefit request. 8 C.F.R. § 103.3(a)(1)(i). Here, the Director does not clearly explain the conclusion that the Petitioner did not demonstrate the *bona fides* of the job offer for the offered position of registered nurse, as the Director makes contradictory findings regarding the intended work location.

In this case, the labor certification application and accompanying prevailing wage determination list the worksite as the Petitioner's office, but the job-duty sections of these documents state: "The worksite is unknown at this time."[1] An addendum to the Petitioner's Form I-140, Immigrant Petition for Alien Worker, list two worksites: the Petitioner's office; and a client hospital in the same state, about 200 miles away. The addendum states that the Beneficiary would permanently work at one location, but it does not specify which one. The Petitioner also submitted a copy of its staffing agreement with the client and a notice of filing posted at the hospital client site prior to the petition's filing. *See* 20 C.F.R. § 656.15(b)(2) (requiring Schedule A labor certification applications to include evidence of filing notices posted at employment locations). On appeal, the Petitioner further submits a letter from the client stating that the Beneficiary would work at the hospital while employed by the Petitioner.

As noted by the Petitioner on appeal, the Director's decision did not address all of the evidence regarding the offered position's worksite and employment conditions. We will therefore remand the matter. On remand, the Director should ask the Petitioner to submit any additional evidence or information needed, and provide the company a reasonable opportunity to respond. The Director should then review the entire record, develop the analysis, and enter a new decision. If the decision

[1] A labor certification employer must obtain a prevailing wage determination from DOL to establish the minimum, acceptable wage for an offered position. *See* 20 C.F.R. § 656.10(c)(1) (requiring an employer to certify that its proffered wage equals or exceeds a position's prevailing wage). According to DOL, if a petitioner is unsure about where the Schedule A beneficiary will work at the time the prevailing wage is filed, they should use their headquarters location for the prevailing wage and post the notice of filing at any possible location. DOL, "OFLC [Office of Foreign Labor Certification] Frequently Asked Questions and Answers," Notice of Filing, 12., https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!176 (last visited July 9, 2019).

is adverse, the Director must clearly identify any denial grounds with citation to pertinent statutes, regulations, case law, or USCIS policy.

III. 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). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the labor certification application states the proffered wage of the offered position of registered nurse as $58,635 a year. The petition's priority date is June 28, 2018, its filing date. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).[2]

The Petitioner submitted a copy of its federal income tax return for 2017. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks required evidence of the Petitioner's ability to pay the proffered wage in 2018, the year of the petition's priority date.

Also, USCIS records indicate the Petitioner's filing of multiple immigrant petitions. 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 its other petitions that were pending or approved as of this petition's priority date of June 28, 2018, or filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming revocation of a petition's approval where, as of the grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).

USCIS records indicate that the Petitioner had at least 10 other petitions that were pending or approved as of June 28, 2018, or filed thereafter.[3] The record, however, does not contain the proffered wages or priority dates of the other petitions. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all applicable petitions. Because the Director did not notify the Petitioner of this deficiency, we will remand the matter.

On remand, the Director should instruct the Petitioner to provide the proffered wages and priority dates of its other petitions. The Petitioner may also submit additional evidence of its ability to pay,

[2] The Director's request for additional evidence incorrectly identified the petition's priority date as March 8, 2005. That is the priority date of an approved petition that another company filed for the Beneficiary. The Petitioner therefore need not demonstrate its ability to pay the proffered wage before 2018.

[3] USCIS records identify the 10 petitions by the following receipt numbers: [redacted] USCIS denied two of the petitions, but they remain pending on appeal.

including documentation of any wages it paid to applicable beneficiaries in 2018 or supporting the ability-to-pay factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The Director should also instruct the Petitioner to submit copies of an annual report, federal tax return, or audited financial statements for 2018.

IV. THE BENEFICIARY'S EDUCATIONAL QUALIFICATIONS

Finally, the record does not establish the Beneficiary's educational qualifications for the offered position. A petitioner must establish a beneficiary's possession of all of a position's job requirements by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(l)(3)(ii)(B).

Here, the labor certification application states the minimum educational requirements of the offered position of registered nurse as a U.S. associate's degree or a foreign equivalent degree in nursing. The application specifies that the Petitioner will not accept an alternate combination of education and experience.

The Petitioner submitted copies of a nursing diploma, transcripts, and certificates from India. The documents indicate that, by the petition's priority date, the Beneficiary completed a three-year nursing program and obtained government certifications as a nurse and midwife. Contrary to the minimum educational requirements stated on the labor certification application, however, the record lacks evidence that one of the credentials equates to a U.S. associate's degree in nursing. The Petitioner therefore has not demonstrated the Beneficiary's educational qualifications for the offered position.

On remand, the Director should instruct the Petitioner to submit additional evidence of the Beneficiary's possession of a foreign degree that equates to a U.S. associate's degree. The Director should afford the Petitioner a reasonable period to respond to this issue and the others raised in this opinion. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

V. CONCLUSION

The Director did not consider all of the evidence regarding the offered position's worksite. Also, the Petitioner has not demonstrated its ability to pay the combined proffered wages of this and other petitions from this petition's priority date onward, or the Beneficiary's qualifying education for the offered position.

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

Cite as *Matter of K-S- LLC*, ID# 2994955 (AAO July 22, 2019)