U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17163201

Date: JUN. 02, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a beauty supply store, seeks to employ the Beneficiary as a store clerk. It requests classification of the Beneficiary as an unskilled worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b) (3)(A)(iii). This immigrant visa category allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

After the petition's initial grant, the Director of the Texas Service Center revoked the its approval. The Director concluded that, because the Petitioner decided to hire the Beneficiary for the offered position before it was publicly advertised, the job offer to the Beneficiary was not *bona fide*.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). 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 decision of the Director. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id*.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves

the petition, a foreign national may finally 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.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS may issue a notice of intent to revoke (NOIR) if the unrebutted and unexplained record, as of the NOIR's issuance, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, USCIS may revoke a petition's approval if a petitioner's response does not overcome the grounds stated in an NOIR. *Id.* at 452.

II. *BONA FIDE* JOB OFFER

In this case, the accompanying labor certification was filed on February 15, 2017. The labor certification states that the Petitioner publicly advertised the job opportunity of store clerk from November to December 2016.

Following the approval of the petition, the Beneficiary was interviewed abroad for an immigrant visa. During the interview, the Beneficiary stated that he was referred to the Petitioner by a friend, and that he first communicated with the Petitioner in early 2017, before it offered him the position of store clerk. The interviewing Consular Officer returned the petition to USCIS for review, noting that it appeared that the offered position was not available and specifically created for the Beneficiary.

The Director issued a NOIR, informing the Petitioner that the job offer did not appear to be *bona fide*.[1] He stated that because "the labor certification with the Beneficiary's name on it was filed on February 15, 2017, before the Beneficiary had contact with the Petitioner … the position appears to have been created specifically for the Beneficiary."

The Petitioner responded to the NOIR with an affidavit from its president. In the affidavit, the Petitioner states that the Beneficiary was referred to him by a friend in August 2016, and that he communicated with the Beneficiary through this friend until early 2017, when he began communicating directly with the Beneficiary. He also confirms his need for a full-time store clerk and states that the position was not created for the Beneficiary.

After receiving the Petitioner's response to the NOIR, the Director revoked the petition's approval. He noted that the Petitioner advertised for the position from November to December 2016, after it had already made the decision to hire the Beneficiary. He concluded that "the advertisement was never intended to be used as a vehicle for hiring anybody but the Beneficiary … the position was always intended for the Beneficiary … Therefore, the evidence does not show that the Petitioner made a *bona fide* job offer to the Beneficiary."

[1] The petitioner has the burden of establishing that a *bona fide* job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361; 20 C.F.R. § 656.17(l).

On appeal the Petitioner submits another statement from its president and a brief from counsel. In its statement, the Petitioner asserts that it complied with the labor certification recruitment process and was unable to find an able, willing, available and qualified U.S. worker for the offered position of store clerk. In the brief, counsel provides a description of the DOL's labor certification process, including the need to identify a particular beneficiary prior to filing, and asserts that the Director erred in revoking the approval of the petition. We agree.

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. Thus, the Director erred in revoking the approval of the petition for lack of a *bona fide* job opportunity solely due to the Petitioner's identification of the Beneficiary as an applicant prior to the commencement of the labor certification recruitment process. The Petitioner has established by a preponderance of the evidence that the job offer is *bona fide*. We will therefore withdraw the Director's decision on the issue of *bona fide* job offer.

III. ABILITY TO PAY

Although not discussed by the Director, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage of $18,595 per year, from the priority date on February 15, 2017, and continuing until the beneficiary obtains lawful permanent residence. The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2017, the year of the priority date. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

We note that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *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, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). USCIS records show that the Petitioner has filed a Form I-140 petition for one other beneficiary.[2] Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiary of the other Form I-140 petition that was pending or approved as of, or filed after, the priority date of the current petition.

Therefore, we will remand the matter to the Director to analyze the record and determine whether the Petitioner has established its ability to pay the proffered wage to this Beneficiary, and the beneficiary

[2] On the petition, the Petitioner lists its total number of employees as four. The Petitioner has filed a Form I-140 petition for another store clerk, with an offered wage of $17,763 per year.

of its other petition, from the priority date onward. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

IV. CONCLUSION

Considering the above discussed deficiencies, we are withdrawing the Director's revocation and remanding the petition to allow the Petitioner an opportunity to address the additional deficiencies identified above. On remand, the Director may wish to issue a new NOIR outlining the deficiencies above and allowing the Petitioner an opportunity to respond. The Director should consider any new evidence submitted and, if deficient, must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme.

If the Director issues a new NOIR, the content of that notice and the consideration of any evidence submitted by the Petitioner should comply with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. The Director shall then issue 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.