U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-P-, INC.

DATE: JUNE 6, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a residential group facility, seeks to employ the Beneficiary as a nursing assistant. It initially requested classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* 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 foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the labor certification did not require two years of training or experience and therefore did not support the requested classification of skilled worker.

The Petitioner appealed the decision, claiming that it intended to request immigrant classification for the Beneficiary as an unskilled worker under section 203(b)(3)(A)(iii) of the Act,[1] but inadvertently marked the wrong box for skilled worker on the Form I-140, Immigrant Petition for Alien Worker. We affirmed the Director's decision and dismissed the appeal.

The matter is now before us on a motion to reconsider.[2] On motion, the Petitioner submits additional evidence and again asserts that it intended to request immigrant classification for the Beneficiary as an unskilled worker.

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[1] Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

[2] The regulation at 8 C.F.R. § 103.5(a)(3) states:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Upon review, we will grant the motion to reconsider, and remand the matter for further proceedings consistent with the following opinion and for the entry of a new decision.

I. PROCEDURAL HISTORY

In Part 2.1.f. of the Form I-140, the Petitioner specified that the petition was being filed for a skilled worker requiring at least two years of specialized training or experience. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). On the labor certification, the Petitioner specified that the only education required for the job offered is a certified nurse assistant (CNA) certificate. The labor certification also specified that no training or experience is required.[3]

The Director issued a notice of intent to deny (NOID) indicating, in part, that the labor certification did not support the skilled worker classification. In response to the NOID, the Petitioner's counsel submitted a statement indicating that "there was a mistake" in the Petitioner's classification request, and she asked to have the classification category of the petition changed to the unskilled worker classification, which requires less than two years of training or experience (Part 2.1.g. of the Form I-140). The Petitioner submitted a new Form I-140 with the corresponding change of classification request.

In his decision, the Director found that the labor certification did not require two years of training or experience and therefore did not support the requested classification of skilled worker. The Director also stated that amending the petition as requested by the Petitioner – from skilled worker to unskilled worker – would constitute an impermissible material change absent evidence of a clerical error, which the Petitioner did not furnish. Accordingly, the Director determined that the classification category on the petition could not be amended to unskilled worker.

On appeal, the Petitioner, through counsel, again asserted that a clerical error was made on the Form I-140, which was meant to be filed for an unskilled worker rather than a skilled worker. The Petitioner submitted documentation about the Beneficiary's nurse training program to establish that it required less than two years of training. In our dismissal of the appeal, we found that there was insufficient evidence of the Petitioner's intent to request the unskilled worker classification. We did not accept the Petitioner's claim that the job requirements on the labor certification dictated the requested classification on the petition, pointing out that the instructions on the Form I-140 require a petitioner to select the immigrant classification sought.

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[3] The regulation at 8 C.F.R. § 204.5(l)(4) provides in pertinent part:

> The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In its motion to reconsider, the Petitioner submits a letter signed by its chief financial officer (CFO) and reiterates its contention that it intended to request immigrant classification for the Beneficiary as an unskilled worker under section 203(b)(3)(A)(iii) of the Act, but inadvertently marked the wrong box for skilled worker on the Form I-140. The Petitioner asserts that the petition should be approved under the unskilled worker classification.

II. ANALYSIS

A. Change of Classification

In its current motion, the Petitioner asserts that it did not materially change its petition by submitting a new Form I-140 selecting the unskilled worker classification because the amendment seeks to correct an error on the original filing. According to the Petitioner, since the labor certification accompanying the original petition did not require any training or experience, and the evidence submitted on appeal showed that the CNA certificate required by the labor certification took the Beneficiary less than one month of coursework to acquire, it was clear that the Petitioner was seeking unskilled worker classification for the Beneficiary. The unskilled worker classification was the only classification that the labor certification could support. The Petitioner claims that the selection of the skilled worker classification was an inadvertent clerical error by her attorney's paralegal staff, which prepared the Form I-140, and that both the attorney and the Petitioner overlooked the error when they signed the Form I-140.

The U.S. Citizenship and Immigration Services (USCIS) website gives the following instructions with regarding to correcting an error:

> When we accept your Form I-140 for processing, we create an electronic record and mail a Form I-797, Receipt Notice, to you and the representative on the Form G-28. The receipt notice will indicate the visa category that you requested on Part 2 of the Form I-140. Make sure this category is correct. If it is not correct (for example, if you or USCIS has made a clerical error), immediately call the National Customer Service Center at 1-800-375-5283 or 1-800-767-1833 (TTY) to request that we change the visa classification before making a decision on your form.
>
> Although you may request that we change the visa classification to correct a clerical error in Part 2 of the form, we will make the final determination about whether to change the visa classification based on everything in your case. If we deny your Form I-140 because you are ineligible for the requested visa category, we will also deny any Form I-485, Application to Register Permanent Residence or Adjust Status that you filed with it.
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> We cannot change the visa category if we have already made a decision on your Form I-140.

Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker, https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker (last visited May 17, 2017).

Therefore, USCIS guidance permits a petitioner to request a change of classification prior to adjudication to correct a clerical error in Part 2 of the Form I-140. Further, USCIS guidance states that the determination regarding whether to change the visa preference classification will be made by USCIS based on "everything in [a petitioner's] case." On motion, we agree with the Petitioner that it sufficiently established that its original classification request was a clerical error. We will withdraw the Director's decision denying the Petitioner's request to change the classification in Part 2 of the Form I-140. However, as discussed below, we will remand the matter to the Director for entry of a new decision addressing the merits of the Form I-140 under the unskilled worker classification.

B. Actual Minimum Requirements of the Offered Job

Pursuant to 20 C.F.R. § 656.17(i)(1), the job requirements described on the labor certification must represent the Petitioner's actual minimum requirements for the job opportunity. As noted in our prior appeal decision, evidence of record casts doubt on whether the accompanying labor certification states the Petitioner's actual minimum requirements for the offered position. The Beneficiary attested on the labor certification that she was employed by the Petitioner in the offered position from October 1, 2005, until the petition's priority date of January 10, 2014. The Beneficiary did not receive CNA certification until 2012. If the Beneficiary performed the job duties of the offered position from 2005 to 2012 without CNA certification, the offered position does not appear to require the CNA certification. *See* 20 C.F.R. § 656.17(i)(2) (barring a labor certification employer from hiring workers with less training or experience for jobs "substantially comparable" to the job opportunity). Also, USCIS records indicate a prior labor certification application filed by the Petitioner for the Beneficiary in a position with the same job duties as the offered position. However, unlike this case, the prior labor certification required six months of training in the job opportunity in addition to CNA certification. The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On remand, the Director should determine whether the job requirements described on the labor certification represent the Petitioner's actual minimum requirements for the job opportunity.

C. Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) states, in part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability

> to pay the proffered wage. 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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The record contains a letter from the Petitioner's CFO indicating that it employs 100 or more workers, but the letter gives no further information about the Petitioner or its continuing ability to pay the proffered wage, such as its net income or net current assets. Further, the labor certification indicates that it has 150 employees, while the Form I-140 indicates that it has 237 employees. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Ho*, 19 I&N Dec. at 591-592.

On remand, the Director should determine whether the Petitioner has the ability to pay the proffered wage from the priority date onward.

III. CONCLUSION

The decision of the Director rejecting the Petitioner's request to change the immigrant visa classification will be withdrawn. The matter is remanded to the Director for consideration of the petition under the unskilled worker classification, including whether the job requirements described on the labor certification represent the Petitioner's actual minimum requirements for the job opportunity, and whether the Petitioner has the ability to pay the proffered wage from the priority date onward. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

ORDER: The motion to reconsider is granted, and the matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of A-P-, Inc.*, ID# 81259 (AAO June 6, 2017)