U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF UCE-C-

DATE: JUNE 23, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a nonprofit provider of day care and educational services, seeks to employ the Beneficiary as an instructional coordinator. It requests his classification as a member of the professions holding an advanced degree under the second-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This category allows U.S. employers to sponsor foreign nationals for lawful permanent resident status if they have master's degrees, or bachelor's degrees followed by five years of experience.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish the Petitioner's required intention to employ the Beneficiary in a permanent, full-time position. The Director also invalidated the accompanying labor certification, finding that the Petitioner willfully misrepresented the nature of the offered position on the document.[1]

On appeal, we reinstated the labor certification, ruling that the Petitioner established the *bona fides* of the job offer. But we dismissed the appeal and denied the following motions to reopen and reconsider, finding that the Petitioner did not demonstrate its required ability to pay the proffered wage, or establish its purported new owner as its successor in interest.[2]

On motion to reconsider, the Petitioner submits additional evidence in support of its ability to pay the proffered wage and the claimed successorship. The Petitioner also asserts that we unjustly raised new issues on appeal.

Upon review, we will deny the motion.

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[1] The U.S. Department of Labor (DOL) must certify that the United States lacks able, willing, qualified, and available workers for an offered position and that the employment of a foreign national will not harm the wages or working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). U.S. Citizenship and Immigration Services (USCIS) may invalidate a labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact involving the certification. 20 C.F.R. § 656.30(d).

[2] *See Matter of UCE-C-*, ID# 47197 (AAO Jan. 26, 2017); *Matter of UCE-C-*, ID# 13696 (AAO Apr. 4, 2016).

I. LAW AND ANALYSIS

A motion to reconsider must state reasons for reconsideration and establish an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). A petitioner must base a motion to reconsider on the record as of the last decision. *Id.*

In this case, the Petitioner partially bases its motion to reconsider on new evidence. In support of its ability to pay, the Petitioner submits a copy of its federal income tax returns for 2015. As evidence of the purported successorship in interest, the Petitioner submits copies of corporate documents. Because new evidence cannot support reconsideration, the submitted materials do not establish our incorrect application of law or agency policy.

Even if we could consider the new materials, they do not demonstrate the Petitioner's ability to pay the proffered wage or the successorship of its claimed new owner. In our prior decisions, we found that the record does not establish the Petitioner's ability to pay in 2010, 2011, 2013, or 2014. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence). The tax returns submitted on motion appear to demonstrate the Petitioner's ability to pay in 2015. But they would not establish its ability to pay in the prior years, or materially change our analysis under *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967) (allowing USCIS to consider other factors affecting a petitioner's ability to pay). Also, as indicated in our prior decisions, the Petitioner has not demonstrated its ability to pay the combined proffered wages of this and another of its petitions that remained pending after this petition's priority date. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition where, as of its approval, the petitioner did not establish its ability to pay the combined proffered wages of multiple, pending petitions).

Further, the newly submitted evidence does not overcome the issues raised in our prior decision regarding the Petitioner's claimed sale in 2015 and the alleged existence of a successor in interest. In fact, the Petitioner's 2015 tax returns submitted on motion casts doubt on its claimed transfer of assets that year to its current chief executive officer. Contrary to the asset purchase agreement that the Petitioner previously submitted, line 32 of Part IV of its IRS Form 990, Return of Organization Exempt from Income Tax, indicates that it did not "sell, exchange, dispose of, or transfer more than 25% of its net assets" in 2015. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). The additional corporate registration printouts from the California Secretary of State likewise do not explain the discrepancies in the record or establish the existence of a successor.

While the newly submitted evidence does not support the motion, we may consider the Petitioner's assertion that, on appeal, we unjustly questioned its ownership and ability to pay the proffered wage. Noting that these visa petition proceedings have lasted more than six years, the Petitioner states that "it is manifestly unjust to now raise additional issues that would not have arisen had USCIS timely and correctly adjudicated the [petition] in the first place."

As indicated in our appellate decision, however, we exercise *de novo* review of all issues of fact, law, policy, and discretion. *See Matter of Dhanasar*, 26 I&N Dec. 884, 884 (AAO 2016). This means that we look at the record anew and need not defer to findings made in the initial decision. It also means that we may address new issues that were not raised or resolved in a prior decision.

Here, by filing the appeal, the Petitioner asked us to exercise *de novo* review. We raised the issues of its ownership and ability to pay the proffered wage in a notice of intent to dismiss (NOID) the appeal. Because a labor certification remains valid only for the particular job opportunity stated on it, *see* 20 C.F.R. § 656.30(c)(2), the Petitioner's ownership change could have affected the validity of the labor certification in this matter. Also, as previously indicated, every petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date onward. *See* 8 C.F.R. § 204.5(g)(2).

Our NOID informed the Petitioner of these issues and afforded it a reasonable opportunity to respond. *See* 8 C.F.R. § 103.2(b)(16)(i) (requiring USCIS, before issuing an adverse decision, to notify a petitioner of material, derogatory information of which it may be unaware and give it an opportunity to respond). Therefore, contrary to the Petitioner's assertion, the record does not establish our questioning of its ownership and ability to pay on *de novo* review as improper or unjust.

II. CONCLUSION

The Petitioner's motion to reconsider does not establish our incorrect application of law or agency policy and does not demonstrate eligibility for the benefit sought. We will therefore affirm our most recent decision.

ORDER: The motion to reconsider is denied.

Cite as *Matter of UCE-C-*, ID# 462628 (AAO June 23, 2017)