U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A- INC.

DATE: JUNE 29, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a grocery store operator, seeks to employ the Beneficiary as a department supervisor. It requests her classification as a skilled worker under the third-preference, immigrant category. *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, "EB-3" category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that its accompanying labor certification was invalid. The Director found that the certification expired because the Petitioner untimely filed the document in support of the petition.[1]

On appeal, the Petitioner submits additional evidence. It asserts its timely filing of the labor certification with the petition, contending that U.S. Citizenship and Immigration Services (USCIS) erroneously rejected the submission.

Upon *de novo* review, we will withdraw the Director's decision and remand this matter for further proceedings consistent with the following opinion and for the entry of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer files a labor certification application with 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). The DOL must certify that the United States lacks able,

[1] The Director's decision asserts that we must reject any appeal in this matter because an invalid labor certification accompanied the petition. The decision acknowledges our general appellate jurisdiction over employment-based, immigrant petitions, but notes an exception where a denial results from "lack of a [labor] certification." Department of Homeland Security Delegation No. 0150.1, § U (effective Mar. 1, 2003) (assigning appellate jurisdiction to us over the matters listed in former 8 C.F.R. § 103.1(f)(3)(iii)). This jurisdictional exception, however, does not prevent us from considering the validity of an accompanying labor certification on appeal. *See Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 283 (Reg'l Comm'r 1979). As in *Sunoco Energy*, the petition here includes an original labor certification that was found invalid. We therefore have appellate jurisdiction to review the labor certification's validity.

willing, qualified, and available workers for an offered position, and that employment of a foreign national will not hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If the DOL approves the labor certification application, the employer then files an immigrant visa petition with USCIS. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves a petition, the foreign national 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

A. The Validity of the Labor Certification

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a skilled worker petition must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). A labor certification generally expires if not filed with a petition within 180 calendar days of the certification. 20 C.F.R. § 656.30(b)(1).[2]

Here, the record indicates the DOL's approval of the labor certification application on September 26, 2013, and the Petitioner's submission of the original certification with the petition 177 days later, on March 21, 2014. The Director, however, rejected the submission, finding that the petition lacked a filing fee in the required amount and a valid labor certification. *See* 8 C.F.R. § 103.2(a)(1) (requiring a petition's filing with the regulatory-specified fee).

Upon review, we find that the record indicates that the Petitioner submitted the correct filing fee and that it met regulatory requirements. *See* 8 C.F.R. § 103.7(a)(1), (2) (requiring filing fees to be in the prescribed amount, drawn on a U.S. institution, and payable in U.S. currency). The Petitioner also established its submission of an original labor certification on Form ETA 750, Application for Employment Certification, with the petition. The Director appears to have questioned the validity of the labor certification, which indicates its filing in 2001, because the Form ETA 750 is outdated.[3] However, despite the age of the form, it is an original labor certification, as required.

Thus, the record indicates the Petitioner's submission of the original labor certification and the correct filing fee with the petition within 180 days of the certification. The labor certification is therefore valid, and the Director should have accepted the petition as properly filed on March 21, 2014. We will therefore withdraw the Director's decision and remand this matter for further consideration and for the entry of a new decision.

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[2] If granted before July 16, 2007, a labor certification had to be filed with a petition by January 14, 2008. 20 C.F.R. § 656.30(b)(2).

[3] The DOL introduced a revamped labor certification process in 2005, replacing Form ETA 750, Application for Alien Employment Certification, with ETA Form 9089, Application for Permanent Employment Certification. *See* Final Rule on Labor Certification for the Permanent Employment of Aliens in the United States, 69 Fed. Reg. 77326 (Dec. 27, 2004).

B. Issues on Remand

A petitioner seeking skilled-worker classification must demonstrate its ability to pay a proffered wage from a petition's priority date onward, *see* 8 C.F.R. § 204.5(g)(2), and a beneficiary's possession of the minimum experience required for an offered position. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B).[4]

Here, from the petition's priority date of April 30, 2001, onward, the record does not establish the Petitioner's continuing ability to pay the proffered wage of $17.12 an hour, or $35,609.60 a year for a 40-hour work week. The record lacks required evidence of the Petitioner's ability to pay after 2011. *See* 8 C.F.R. § 204.5(g)(2) (requiring evidence of ability to pay in the form of annual reports, federal income tax returns, or audited financial statements). Also, copies of the Petitioner's tax returns for 2003, 2006, 2007, and 2010 do not reflect sufficient annual amounts of net income or net current assets to pay the proffered wage.[5]

In addition, the record lacks evidence of the Beneficiary's possession of two years of experience in the job offered, which the labor certification specifies as the minimum, required amount for the offered position. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring a letter from an employer to support a beneficiary's claimed experience).

On remand, the Director should inform the Petitioner of these evidentiary deficiencies and afford it a reasonable opportunity to respond. The Director may also request additional evidence regarding any other petition defects. Upon receipt of a timely response, the Director should review the entire record and issue a new decision.

III. CONCLUSION

The Petitioner filed the labor certification with the petition within 180 days of its certification by the DOL. A valid labor certification therefore accompanied the petition.

ORDER: The decision of the Director is withdrawn. 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- Inc.*, ID# 483248 (AAO June 29, 2017)

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[4] The priority date of a petition accompanied by a labor certification is the date the DOL received the labor application for processing. 8 C.F.R. § 204.5(d).

[5] The Petitioner filed its tax returns as an S corporation. S corporations that receive income adjustments from sources outside their businesses or trades reconcile their income on Schedule K to IRS Form 1120S, U.S. Income Tax Return for an S Corporation. *See* Internal Revenue Serv. (IRS), "Instructions to Form 1120S," 20, at https://www.irs.gov/pub/irs-pdf (last visited June 22, 2017). Because the Petitioner reported income from other sources in 2006 and 2010, we consider lines 23 and 18 of the Schedules K for those respective years to reflect its annual amounts of net income.