U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10183159

Date: MAR. 26, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, an operator of a gas station/convenience store, seeks to employ the Beneficiary as a cashier. The company requests her classification under the third-preference, immigrant category for skilled workers. See Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Texas Service Center denied the petition and dismissed the Petitioner's following motions to reopen and reconsider. The Director concluded that, contrary to the Act and Department of Homeland Security regulations, the Petitioner did not demonstrate the availability of the offered position to U.S. workers or the company's intention to employ the Beneficiary in the job.[1]

The Petitioner bears the burden of establishing eligibility for the requested benefit. See section 291 of the Act, 8 U.S.C. § 1361. 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 generally follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must 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 an offered position. Id. Labor certification also indicates that employment of a noncitizen 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 determines whether a beneficiary meets the

[1] The Director referred to the availability of the offered position to U.S. workers as "the bona fides of the job offer." That term, however, may also describe a petitioner's intention to employ a beneficiary in an offered position. To avoid confusion, we will refer to the availability of the offered position to U.S. workers as the "the bona fides of the job opportunity." We will call the issue of the Petitioner's intention to employ the Beneficiary in the offered position "the bona fides of the job offer."

requirements of a DOL-certified position and a requested immigrant visa classification. If USCIS grants a petition, a designated noncitizen 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.

II. BONA FIDES OF THE JOB OPPORTUNITY

An employer must attest on a labor certification application that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8).

> Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a bona fide job opportunity.

Matter of Modular Container Sys., Inc., 89-INA-228, slip op. at 7 (BALCA July 16, 1991) (en banc).

The Petitioner attested to the bona fides of the job opportunity of cashier on the accompanying labor certification. But the Director noted that the company's president/owner and the Beneficiary knew of each other before the application's filing in 2019. On a 2015 application for a U.S. visitor's visa, the Beneficiary listed the president/owner as her "contact person" in the United States, describing him as a "friend."

In affidavits, the Beneficiary, her spouse, and the Petitioner's president/owner identified the president/owner as "a friend of a friend." The Beneficiary and her spouse applied for visas in 2015 to visit their friend in the United States. Because the friend was renovating his home at the time of the applications, they said they followed his advice and listed his friend - the Petitioner's president/owner - as the U.S. contact person on their applications. The Beneficiary and her spouse stated that they did not then personally know the president/owner, but later met him at a wedding in Pakistan in 2016. They stated that, when the Beneficiary most recently entered the United States in 2018, she did not intend to work for the Petitioner. Rather, the couple said that, before their friend told them of the Petitioner's job opportunity in Virginia, the Beneficiary sought employment in Texas.[2]

The relationship between the Petitioner's president/owner and the Beneficiary before the filing of the labor certification casts doubt on the availability of the offered position to U.S. workers. The evidence, however, does not support the non-bona fides of the job opportunity. Contrary to the guidelines provided in Modular Container, the record does not indicate the Beneficiary's possession of a dominant role in the Petitioner's business, an ability to control hiring for the offered position, or a "close," personal relationship with the company's president/owner. We will therefore withdraw the Director's contrary finding.

[2] USCIS records indicate that the Beneficiary and her spouse last entered the United States as visitors in [redacted] on May 6, 2018. In a recruitment report submitted to DOL during the labor certification process, the Petitioner indicated its initiation of the recruitment period by requesting a prevailing wage determination on June 11, 2018.

III. BONA FIDES OF THE JOB OFFER

A business may file a petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary pursuant to the terms and conditions of an accompanying labor certification. See Matter of Izdebska, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of an accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis).

The accompanying labor certification states the Petitioner's intention to employ the Beneficiary as a cashier in Virginia. The Director, however, noted the application's listing of the Beneficiary's residence in Texas. The Director also found that the Beneficiary's affidavit states neither her intention to work in the offered position nor her willingness to move to Virginia. The Director therefore concluded that the Petitioner did not demonstrate its intention to employ the Beneficiary in the offered position.

The Beneficiary's residence outside the state of intended employment, however, would not necessarily indicate her lack of intent to work in the offered position. A beneficiary need not begin working for a petitioner until after they obtain lawful permanent residence. See USCIS' Proposed Rule for Retention of EB-1, EB-2, and EB-3 Immigrant Workers, 80 Fed. Reg. 81900, 81916 (Dec. 31, 2015) (stating that a beneficiary "need not have been employed at any time by the employer that filed the immigrant visa petition").

Moreover, contrary to the Director's findings, the record indicates the Beneficiary's intention to work in the offered position and willingness to move to Virginia. The Beneficiary's affidavit states that she "accepted" the job offer. Also, while the labor certification application lists the Beneficiary's address in Texas, the Form I-140, which was filed about five months after the labor application, lists her address in the Virginia city of the proposed worksite. Her Form I-485, Application for Adjustment of Status, which was concurrently filed with the petition, lists the same Virginia address. In addition, the Beneficiary's affidavit identifies Virginia as the site of the document's notarization and signing. Thus, contrary to the Director's findings, evidence indicates not only the willingness of the Beneficiary to move to Virginia, but also her actual relocation to the state.

For the foregoing reasons, the record does not support the petition's denial based on a non-bona fide job offer. We will therefore also withdraw this finding.

IV. ABILITY TO PAY THE PROFFERED WAGE

The appeal overcomes the denial grounds. But the record does not establish the petition's approvability. Although unaddressed by the Director, the Petitioner has not demonstrated its required 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). If, as here, a petitioner employs less than 100 people, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. Id.

The labor certification states the proffered wage of the offered position of cashier as $26,500 to $26,750 a year. The petition's priority date is January 2, 2019, the date DOL received the labor certification application for processing. See 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

At the times of the Director's denial of the petition and dismissals of the Petitioner's following motions, regulatory required evidence of the company's ability to pay the proffered wage in 2019, the year of the petition's priority date, was not yet available. The Director determined the company's ability to pay based on a copy of its federal income tax return for 2018. The Petitioner submitted financial statements for 2019. Contrary to 8 C.F.R. § 204.5(g)(2), however, the statements do not indicate that they were "audited." Also, the statements cover only the first quarter of 2019. The Petitioner therefore did not establish its ability to pay the proffered wage from the petition's priority date onward.

Because regulatory required evidence of the Petitioner's ability to pay the proffered wage was previously unavailable, we will remand the matter. On remand, the Director should issue a written notice asking the Petitioner to submit copies of annual reports, federal tax returns, or audited financial statements for 2019 and, if available, 2020. See 8 C.F.R. § 204.5(g)(2). The Petitioner may also submit additional evidence of its ability to pay, including proof of any wages it paid the Beneficiary in relevant years or materials supporting the factors stated in Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

If supported by the record, the Director may raise additional, potential grounds of denial. The Director must provide the Petitioner a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

V. CONCLUSION

The record does not support the petition's denial on the stated grounds of a non-bona fide job opportunity and offer. The Petitioner, however, did not demonstrate its required ability to pay the proffered wage of the offered position from the petition's priority date onward.

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