U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15821034

Date: MAY 4, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, an operator of a martial arts school, seeks to employ the Beneficiary as a master instructor. The company requests his classification under the third-preference, immigrant category for "other workers." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).[1]

The Director denied the petition, concluding that the record does not establish the Beneficiary's qualifications for the requested classification. The Director found that the Petitioner did not provide requested evidence regarding the Beneficiary's authorization to work in the United States or the relationship between his field of study and the offered position.

The Petitioner appeals the decision and bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will withdraw the decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an unskilled 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 a position. *Id.* Labor certification also signifies that 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 job

[1] The Petitioner initially requested the Beneficiary's classification as a "professional" under section 203(b)(3)(A)(ii) of the Act. In response to the Director's written request for additional evidence (RFE), however, the company submitted an amended Form I-140, which the Director accepted, requesting the Beneficiary's classification as an "other worker."

requirements of a certified position and a requested immigrant visa classification. If USCIS approves 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. MATERIALITY OF THE OMITTED EVIDENCE

USCIS may deny a petition if a petitioner does not submit requested evidence that "precludes a material line of inquiry." 8 C.F.R. § 103.2(b)(14). A line of inquiry is material if it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Matter of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (citation omitted).

In the RFE and a following notice of intent to deny (NOID) the petition, the Director noted that, before the filings of the petition and its accompanying labor certification application, the Beneficiary gained admission to the United States in F-1 nonimmigrant visa status as a college student. *See* section 101(a)(15)(F) of the Act, 8 U.S.C. § 1101(a)(15)(F). In both documents, the Director requested evidence that the Beneficiary's college authorized him to work in the country and that the offered position "is in the beneficiary's field of study." *See* 8 C.F.R. §§ 214.2(f)(9), (10) (describing circumstances under which foreign students may legally work in the United States).

In response to both the RFE and NOID, the Petitioner submitted evidence. But, contrary to the Director's requests, the materials did not demonstrate the Beneficiary's authorization to work in the United States or detail his field of study at college. In its NOID response, the Petitioner explained that the Beneficiary "is not employed by the petitioner. He will be employed on approval of his [lawful permanent residence]." Because the Petitioner did not submit the requested evidence, however, the Director denied the petition. The Director found the Beneficiary "ineligible" for the requested classification.

The requested evidence regarding the Beneficiary's employment authorization and field of study was immaterial to the petition's grant or denial. A petition and an accompanying labor certification offer permanent U.S. employment to a noncitizen *in the future*, beginning upon his or her admission to the country as a lawful permanent resident. During a petition's pendency, a beneficiary need not work for a petitioner, have legal authorization to do so, or even be in the United States. Even if beneficiaries never work for their petitioning employers, they may gain lawful admission to the United States as permanent residents if they intend to work for their petitioners at the time of their admissions. *Matter of Cardoso*, 13 I&N Dec. 228, 230 (BIA 1969). Similarly, "[a]n alien is not required to have been employed by the certified employer prior to adjustment of status." *Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009). Thus, contrary to 8 C.F.R. § 103.2(b)(14), the omitted evidence of the Beneficiary's authorization to work in the United States did not tend to influence, nor could it have influenced, the petition decision. USCIS therefore erred in denying the petition based on the omission of the requested evidence.

Also, neither the accompanying labor certification nor the requested immigrant classification require any education. *See* section 203(b)(3)(A)(iii) of the Act (requiring "other workers" to be able to perform unskilled labor requiring less than two years of training or experience); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977) (requiring a petitioner to demonstrate a beneficiary's possession of all DOL-certified job requirements). Thus, the

Beneficiary's field of study in the United States does not affect his qualifications for the offered position or the requested classification.

For the foregoing reasons, the Petitioner's omission of requested evidence regarding the Beneficiary's employment authorization and field of study did not warrant the petition's denial. We will therefore withdraw the Director's decision.[2]

III. THE BONA FIDES OF THE JOB OFFER

The appeal overcomes the denial ground. But the record does not establish the petition's approvability. The Petitioner has not demonstrated the *bona fides* of its job offer.

A business may file an immigrant visa 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 under the terms and conditions stated on an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (1966) (affirming a petition's denial where, contrary to the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis).

On the petition and accompanying labor certification, the Petitioner stated its intention to permanently employ the Beneficiary as master instructor at the company's facility in [redacted] Virginia on a full-time basis. The Petitioner's website includes a schedule of martial arts classes at the location. The schedule, however, indicates that the classes total only about 30 hours a week. DOL requires full-time employment to entail at least 35 hours a week. DOL Field Memorandum No, 48-94 from Barbara Ann Farmer, Admin'r for Reg'l Mgmt., *Policy Guidance on Alien Labor Certification Issues*, 2 (May 16, 1994). Also, the Petitioner's website indicates that the company has several instructors, suggesting that the Beneficiary would not teach all scheduled classes. (last visited Apr. 30, 2021). The record therefore does not establish the Petitioner's intention to employ the Beneficiary in the offered position on a full-time basis. *See* section 204(b) of the Act (authorizing USCIS to determine whether "the facts stated in the petition are true"); *see also Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

The Director did not notify the Petitioner of this evidentiary deficiency. *See* 8 C.F.R. 103.2(b)(16)(i) (requiring USCIS to advise petitioners of material, derogatory information of which they may not be aware and to provide them with opportunities to respond). We will therefore remand the matter. On remand, the Director should inform the company of the deficiency and request additional evidence of the Petitioner's intention to employ the Beneficiary in the offered position on a full-time basis.

[2]The U.S. immigration status of a beneficiary during petition proceedings may affect his or her future admissibility to the country. *See* section 212(a)(1) of the Act (stating that noncitizens who are inadmissible are ineligible to receive visas and to be admitted to the United States). Inadmissibility, however, is not a ground for denial of a visa petition, nor are petition proceedings the appropriate fora to determine substantive issues of admissibility. *Matter of O-*, 8 I&N Dec. 295, 296-98 (BIA 1959).

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

IV. CONCLUSION

The record does not support the Director's denial of the petition based on the omission of requested evidence. The Petitioner, however, has not demonstrated its intention to employ the Beneficiary in the offered position on a full-time basis.

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