U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30317364

Date: MAY 28, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Professional)

The Petitioner, an eye surgery center, seeks to employ the Beneficiary as a registered nurse. The company requests her classification under the employment-based, third-preference (EB-3) immigrant visa category as a "professional." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). U.S. businesses may sponsor noncitizens in this category to permanently work in jobs requiring at least bachelor's degrees. *Id.*

The Director of the Nebraska Service Center denied the petition.[1] The Director concluded that the petition's accompanying labor certification application does not meet U.S. Department of Labor (DOL) requirements. On appeal, the Petitioner contends that the Director erred.

The Petitioner bears the burden of demonstrating eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that, contrary to the Director's decision, the company filed the petition more than 30 days after its notice had remained posted for the required minimum period and that the notice otherwise complied with DOL regulations. We will therefore sustain the appeal.

I. LAW

Immigration as a professional usually follows a three-step process. First, to permanently fill a position in the United States with a noncitizen, a prospective employer must seek DOL certification. *See* section 212(a)(5)(A)(i) of the Act, (A)(i). Second, if DOL approves a position, an employer next submits the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Finally, if USCIS grants a petition, a noncitizen beneficiary may apply abroad for an immigrant visa or, if eligible, "adjustment of status" in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

[1] The Director's decision states that the Petitioner requested the Beneficiary's EB-3 classification as a "skilled worker." *See* section 203(b)(3)(A)(i) of the Act. But, in Part 2 of the Form I-140, Petitioner for Alien Workers, the company marked the box for a professional. The Director's error was not material, and the Petitioner did not raise the issue on appeal.

DOL, however, has already determined that the United States lacks sufficient "professional nurses" and that noncitizens' employment in these "Schedule A" jobs would not harm the wages or working conditions of U.S. employees in similar jobs. 20 C.F.R. § 656.5. As Schedule A employers need not test the U.S. labor market, DOL authorizes USCIS to apply DOL regulations and adjudicate labor certification applications in Schedule A petitions. 20 C.F.R. § 656.15(a). Thus, here, USCIS rules not only on the petition, but also on its accompanying labor certification application. *See* 20 C.F.R. § 656.15(e) (describing USCIS' Schedule A labor certification determinations as "conclusive and final"); *see generally* 6 *USCIS Policy Manual* E.(7)(A) (providing background on Schedule A petitions).

II. ANALYSIS

A petition for a Schedule A occupation must include a labor certification application. 20 C.F.R. § 656.15(a). To obtain an application's approval, a petitioner must demonstrate that it provided a "notice of filing" (NOF) to either the bargaining representative of its other employees in the occupation, or – if no such representative exists – to the employees themselves. 20 C.F.R. § 656.15(b)(2). When notifying employees, a petitioner must post a NOF at the worksite for at least 10 consecutive business days. 20 C.F.R. § 656.10(d)(1)(ii). The notice must be "clearly visible and unobstructed," posted "in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to and from [the worksite]." *Id.*

A NOF must:

- State that its posting stems from the proposed filing of a labor certification application for the relevant job;
- State that "any person may provide documentary evidence bearing on the application to the [DOL Certifying Officer (CO)];"
- Provide "the address of the appropriate [CO];" and
- "Be provided between 30 and 180 days before filing the [labor certification] application [with a petition]."

20 C.F.R. § 656.10(d)(3)(i-iv).

Because a union does not represent nurses at the Petitioner's surgery center, the company posted a NOF to employees at the worksite from June 26, 2023 to July 21, 2023. The company filed the labor certification application with the petition on August 10, 2023 – 20 days after the removal of the NOF's posting. The Director therefore found that – contrary to 20 C.F.R. § 656.10(d)(3)(iv) – the Petitioner filed the petition less than 30 days after the NOF's removal.

On appeal, the Petitioner contends that it complied with 20 C.F.R. § 656.10(d)(3)(iv). The company argues that its NOF reached the requisite posting period of 10 consecutive business days on July 10, 2023 – 31 days before the petition's filing. Thus, the Petitioner argues that – consistent with the regulation – the company provided the requisite notice to employees more than 30 days before filing the application and petition.

DOL policy supports the Petitioner's interpretation of 20 C.F.R. § 656.10(d)(3)(iv). DOL has publicly stated that "the Notice of Filing must be posted for 10 consecutive business days *during* the 30-to-180-day window prior to filing the [labor certification] application." DOL, Emp't & Training Admin., OFLC [Office of Foreign Labor Certification] Frequently Asked Questions and Answers, "Notice of Filing," No. 10, www.dol.gov/agencies/eta/foreign-labor/faqs/print (emphasis added). Here, the 30-to-180-day window preceding the filing of the labor application with the petition ran from July 11, 2023 to January 12, 2023. The Petitioner demonstrated that, within that window, it posted its NOF for 10 consecutive business days, and the requisite 30 days elapsed prior to filing.[2]

For the foregoing reasons, the Director erred in denying the labor certification application and petition based on the Petitioner's timing of its NOF posting. We have examined the company's filing notice and find that it otherwise complies with the regulations at 20 C.F.R. § 656.10(d)(3)(i-iv). We will therefore sustain the appeal.

ORDER: The appeal is sustained.

[2] The Board of Alien Labor Certification Appeals (BALCA) has not contravened DOL's interpretation of the 30- to 180-day period. In fact, in one case, BALCA assumed (without finding) that – if the business's NOF remained pending at least 10 consecutive business days during the 30- to 180-day window – an employer could meet the requirement at 20 C.F.R. § 656.10(d)(3)(iv). *See Matter of E. Carolina Univ.*, 2010-PER-01472 *4 (BALCA Jan. 12, 2011) ("assuming that the Employer could have filed the application 30 days after the end of the earliest 10 consecutive business days of its posting").