U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34926308

Date: NOV. 7, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, a provider of Internet marketing and website support services, sought to employ the Beneficiary as a web developer. The company requested his classification under the employment-based, third-preference (EB-3) immigrant visa category as a "skilled worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). Businesses may sponsor noncitizens for U.S. permanent residence in this category to work in jobs requiring at least two years of training or experience. *Id.*

The Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that, at the time of the petition's filing, the Petitioner did not demonstrate its required intent to employ the Beneficiary in the offered job. On appeal, we affirmed the revocation. *See In Re: 29885605* (AAO July 2, 2024).

The matter returns to us on the Beneficiary's motion to reconsider.[1] He bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

The Beneficiary persuades us that a preponderance of the evidence demonstrates the Petitioner's intent to employ him in the offered job. But, because the company did not demonstrate its ability to pay the proffered wage, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

A motion to reconsider must establish that our prior decision misapplies law or policy based on the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). Our review on motion is limited to our latest decision. 8 C.F.R. § 103.5(a)(1)(i), (ii) (referencing "the prior decision" and "the latest decision in the proceeding"). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

[1] Because the Beneficiary demonstrated his eligibility to "port" to a new job under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly requested to do so, we must treat him as an "affected party" in these revocation proceedings, allowing him to file appeals and motions. *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017).

II. ANALYSIS

A. Facts

The Petitioner filed the petition in May 2018. The petition did not disclose that, in September 2017, another company had acquired the website support division in which the Beneficiary worked in the offered job. After the acquisition, he worked in the job for the division's new owner. The Petitioner remained in business, continuing to provide Internet marketing services.

U.S. Citizenship and Immigration Services (USCIS) approved the petition in November 2018. About five months later, however, the Beneficiary attended an interview regarding his application for adjustment of status, *see* section 245(a) of the Act, 8 U.S.C. § 1255(a), and testified about the division's sale and his new employer.

A business seeking to employ a noncitizen in the United States must intend to employ them in the offered job permanently. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); *see also Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966). The Director revoked this petition's approval in July 2023, concluding that, at the time of its filing, the Petitioner no longer owned the division in which the Beneficiary worked and did not demonstrate its intent to permanently employ him in the offered job.

The Beneficiary contends that, despite his employment by the division's new owner, the Petitioner intended to hire him back permanently in the offered job in the company's remaining Internet marketing division once he obtained U.S. permanent residence. *See Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009) ("A [noncitizen] is not required to have been employed by the certified employer prior to adjustment of status.")

B. Burden of Proof

We first address the Beneficiary's argument regarding the burden of proof in this matter. He asserts that the petition's revocation required USCIS to prove - by a preponderance of the evidence - that the Petitioner did not intend to employ him in the offered job at the time of the petition's filing. He notes that the Act bars USCIS from revoking a petition's approval unless the Agency has "good and sufficient cause." *See* section 205 of the Act, 8 U.S.C. § 1155. He also notes that, under precedent case law, the immigration service "retains at least the burden of producing substantial evidence supporting its [revocation] determination." *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (citation omitted).[2] "Substantial evidence is more than a scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rivera v. Mukasey*, 508 F.3d 1271, 1274 (9th Cir. 2007) (citation omitted).

Tongatapu, however, also holds that, in petition revocation proceedings, a noncitizen bears the "ultimate" burden of proof. The precedent decision states that, "once the [immigration service] has

[2] Because the Beneficiary resides in the ninth federal circuit, the precedent decisions of the United States Court of Appeals for the Ninth Circuit bind us in this matter. *See Kalubi v. Ashcroft*, 364 F.3d 1134, 1141 (9th Cir. 2004) ("A federal agency is obligated to follow circuit precedent in cases originating within that circuit.") (citation omitted).

produced some evidence to show cause for revoking the petition, the [noncitizen] still bears the ultimate burden of proving eligibility" *Tongatapu*, 736 F.2d at 1308; *see also Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (citation omitted).

Here, the Director provided evidence that, before the petition's filing, the Petitioner transferred the division in which it employed the Beneficiary in the offered job to another company. The division's transfer casts doubt on the company's intent to employ him in the job at the time of the petition's filing.

The division's transfer constitutes more than a scintilla of evidence. A reasonable mind might accept the pre-filing transaction as adequate to support the conclusion that, at the time of the petition's filing, the Petitioner no longer intended to employ the Beneficiary in the offered job. But, under binding Ninth Circuit case law, he still bears the burden to prove - by a preponderance of the evidence - that, at the time of the petition's filing, the Petitioner intended to employ him in the offered job. *See Tongatapu*, 736 F.2d at 1308.

The Beneficiary bears the ultimate burden of demonstrating the Petitioner's intent to employ him in the offered job at the time of the petition's filing. We therefore reject his contrary assertion.

C. The Petitioner's Intent to Employ the Beneficiary

Although the Beneficiary bears the burden of proof, his motion persuades us that the Petitioner demonstrated its intent to employ him in the offered job at the time of the petition's filing. The record contains a letter from one of the company's partners, dated in March 2018, after it had transferred the division in which the Beneficiary worked to another company. In relevant part, the letter states: "It is our desire to employ [him] on a full-time, permanent basis for the foreseeable future." We found the phrase "for the foreseeable future" to suggest that, once the Beneficiary obtained U.S. permanent residence, the Petitioner would not employ him permanently, as required.

On motion, the Petitioner contends that "for the foreseeable future" does not connote temporary employment. To support the contention, the company cites a dictionary defining the phrase "for the foreseeable future" as "as far into the future as you can imagine or plan for." *See* Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/in-for-the-foreseeable-future. Another dictionary, however, contemplates a shorter period, defining the phrase as "at a time that is not long from now: soon." Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/for%20the%20foreseeable%20future. Thus, the phrase "for the foreseeable future" ambiguously refers to the intended duration of the Beneficiary's future employment with the Petitioner.

The Petitioner notes, however, that the letter more fully states the business's intent to employ the Beneficiary "on a full-time permanent basis for the foreseeable future." We agree that the letter's mention of "permanent basis" supports his interpretation of the phrase "for the foreseeable future." Thus, a preponderance of the evidence demonstrates that the letter stated the company's intent to employ the Beneficiary in the offered job permanently. We will therefore withdraw our contrary finding.

We also found that a letter from the company that acquired the Petitioner's division suggests that the Petitioner did not need web developers in its remaining Internet marketing division. The letter states that the Petitioner's 12-person web support division had four web developers, including the Beneficiary. But the letter does not indicate that the four-person Internet marking division included any web developers. Upon reconsideration, we realize that, in concluding that the Petitioner's remaining division did not need web developers, we engaged in speculation. *See Damon v. Ashcroft*, 360 F.3d 1084, 1089 (9th Cir. 2004) (stating that an adjudicator's "personal conjecture cannot be substituted for objective and substantial evidence") (citations omitted). We will therefore also withdraw this contrary finding.

D. Ability to Pay the Proffered Wage

The Beneficiary's motion overcomes our appellate denial ground. The record, however, still indicates the petition's mistaken approval. The company did not demonstrate its ability to pay the offered job's proffered wage.

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains U.S. permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of a petitioner's annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of a petition's priority date. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assents sufficient to pay any differences between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider other factors potentially affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[3]

The Petitioner's labor certification states the proffered wage of the offered position of web developer as $93,600 a year. The petition's priority date is April 25, 2017, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

USCIS approved the petition in November 2018. Thus, the Petitioner had to demonstrate its ability to pay the proffered wage in 2017, the year of the petition's priority date, and in 2018.

The record indicates the Petitioner's employment of the Beneficiary from May 2015 to September 2017. The company submitted a copy of his IRS Form W-2 for 2017. The Form W-2 shows that the Petitioner paid him $41,140.24 that year. That amount does not equal or exceed the annual proffered wage of $93,600. Thus, based solely on wages paid, the Petitioner has not demonstrated its ability to pay the proffered wage.

[3] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, Inc. v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

The Petitioner did not submit regulatory required evidence of its ability to pay in 2017 or 2018. *See* 8 C.F.R. § 204.5(g)(2) ("Evidence of this ability [to pay] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.") Thus, the company did not demonstrate sufficient net income or net current assets to pay the proffered wage in either year.

The Director's notice of intent to revoke (NOIR) the petition's approval did not notify the Petitioner or Beneficiary of this evidentiary deficiency. We will therefore remand the matter.

On remand, the Director should issue the Petitioner and Beneficiary a new NOIR based on insufficient evidence of the company's ability to pay the proffered wage. If supported by the record, the new NOIR may also inform the parties of any other potential revocation grounds, including the prior revocation ground. The Director, however, must afford the Petitioner and Beneficiary a reasonable opportunity to respond to all issues raised in the new NOIR. Upon receipt of a timely response(s), the Director should review the entire record and enter a new decision.

III. CONCLUSION

A preponderance of the evidence demonstrates the Petitioner's intent to permanently employ the Beneficiary in the offered job at the time of the petition's filing. The record, however, does not establish the company's required ability to pay the offered job's proffered wage.

ORDER: The motion to reconsider is granted, and the matter is remanded for entry of a new decision consistent with the foregoing analysis.