U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 01176517

Date: NOV. 22, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a farm, seeks to employ the Beneficiary as an administrative assistant. It requests classification of the Beneficiary as a skilled worker under the third-preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This 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 petition was initially approved. The Director of the Nebraska Service Center subsequently revoked the approval of the petition. The Director determined that due to an undisclosed familial relationship between the Petitioner and the Beneficiary, the record does not establish that the Petitioner made a *bona fide* job offer to the Beneficiary or that the job was clearly open to any U.S. worker. The Director also invalidated the labor certification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. 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 to the Director to determine whether the job offer was *bona fide* and whether the job was clearly open to any U.S. worker. On remand, the Director should also address the following two issues: successor-in-interest and ability to pay.

I. BONA FIDE JOB OFFER

The Director determined that due to an undisclosed familial relationship between the Petitioner and the Beneficiary, the record does not establish that the Petitioner made a *bona fide* job offer to the Beneficiary or that the job was clearly open to any U.S. worker. A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.,* 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) *(en banc)*; *see* 20 C.F.R. § 656.17(l).

On appeal, the Petitioner asserts that it did not check 'Yes' to Part C.9 of the labor certification because the relationship of the Petitioner's owner is "too far-removed to fit into the definition outlined by DOL." The Petitioner cites two BALCA decisions and states that if we find that there is a familial

relationship under DOL's definition, the relationship on its face does not invalidate a *bona fide* job offer. *See Paris Bakery Corp.*, 88-INA-337 (BALCA Jan. 4, 1990); *In Matter of Altobelli's Fine Italian Cuisine,* 90-INA-130, 1991 WL 239636 *3-4 (BALCA Oct. 16, 1991). The Petitioner states that the relationship is only one factor to be considered among multiple other factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding the offered position; incorporated or founded the company; has an ownership interest in the company; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; has qualifications matching specialized or unusual job duties or requirements stated in the labor certification; and is so inseparable from the sponsoring employer because of his or her pervasive presence that the employer would be unlikely to continue in operation without the foreign national. *Modular Container*, 1991 WL 223955, at *8-10.[1]

As the Director did not consider other factors beyond the distant familial relationship, we will withdraw the decision and remand the matter for further consideration of evidence in support of the *Modular Container* factors.

II. SUCCESSOR-IN-INTEREST

Although not discussed by the Director, the record does not demonstrate that the Petitioner intends to employ the Beneficiary in the offered position. An employer may petition for a foreign national if it is "desiring and intending to employ [him or her] within the United States." Section 204(a)(1)(F) of the Act. For labor certification purposes, the term "employer" also means a person or company "which proposes to employ a full-time worker at a place within in the United States." 20 C.F.R. § 656.3.

The Petitioner is [redacted] located in [redacted] California. Documents in the record indicate that the Petitioner was initially organized in California in 1996 under a different name, and it changed its name to [redacted] in February 2001. In May 2018, [redacted] changed its name to [redacted] Cal. Sec'y State, https://businesssearch.sos.ca.gov/ (last visited Nov. 22, 2021). A different entity, [redacted] located at the same address as the Petitioner appears to currently use the fictitious name [redacted] Assessor/Recorder/Cty. Clerk, https://arcc-acclaim.[redacted].ca.gov/search/SearchTypeName (last visited Nov. 22, 2021).

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the intended employer is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). Based on this information, it is not clear whether [redacted] will continue to sponsor the Beneficiary as the Petitioner in this matter, or whether a new entity plans to operate as its successor-in-interest. On remand, the Petitioner should clarify its intent to sponsor the Beneficiary.

[1] The DOL adopted the holding in *Modular Container* at 20 C.F.R. § 656.17(l).

III. ABILITY TO PAY

The Director should determine on remand whether the Petitioner has the continuing ability to pay the proffered wage. The proffered wage is $19.00 per hour ($39,520 per year based on a 40-hour work week). The Petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date on August 5, 2015, until the Beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The regulation requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The Petitioner submitted its tax return for 2015. However, without annual reports, federal tax returns, or audited financial statements for 2016 onward, we cannot affirmatively find that the Petitioner has the continuing ability to pay from the priority date.[2] On remand, the Director should request evidence of the Petitioner's continuing ability to pay.

Accordingly, the following order shall be issued.

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

[2] If [redacted] is a successor to the Petitioner, it must establish eligibility for the immigrant visa in all respects, including evidence of ability to pay. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage from the date of transfer of ownership forward. *Id.* at 482.