U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 11911534

DATE: OCT. 1, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a print and document solutions business, seeks to employ the Beneficiary as a print production supervisor. 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 employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition on the ground that the Petitioner did not reveal the existence of a familial relationship between its co-owner and the Beneficiary on the labor certification and, in connection with that omission, did not establish that the proffered position was a *bona fide* job opportunity open to U.S. workers. On appeal the Petitioner asserts that the Director's decision was incorrect because the definition of family relationship was unclear at the time the labor certification was completed and that the Director did not take into account the Department of Labor's audit of the labor certification application before approving it.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for the consideration of two other issues – whether the Beneficiary meets the experience requirement of the labor certification and the requested visa classification and whether the Petitioner has established its ability to pay the proffered wage.

## I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may 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. ANALYSIS

### A. *Bona Fides* of the Job Offer

The instant petition, filed on December 24, 2015, was accompanied by a labor certification that was filed on April 15, 2014, and approved by the DOL on August 3, 2015. The Director issued a notice of intent to deny (NOID) on January 21, 2020, stating that USCIS records indicated the Beneficiary was the sister-in-law of the Petitioner's co-owner, [redacted], a familial relationship which was not revealed on the labor certification. The Director stated that the Petitioner concealed this family relationship by answering "No" to the question at section C.9 of the labor certification which asked whether the employer is a closely held corporation, partnership, or sole proprietorship in which the Beneficiary has an ownership interest, or whether there is a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the Beneficiary. Concealing the familial relationship in this case, the Director continued, called into question whether the proffered position was a *bona fide* job offer open to any qualified U.S. worker. The Petitioner was afforded 33 days to submit additional evidence.

The Petitioner responded to the NOID with evidence indicating that the Beneficiary is the wife of [redacted]s cousin, not his brother. The Petitioner asserted that there was no regulation or guidance regarding the definition of familial relationship at the time its labor certification was filed, and thus the extended family relationship between the Beneficiary and the Petitioner's co-owner did not warrant an answer of "Yes" to the question at C.9 of the labor certification.[1] Furthermore, regardless of any family connection in this case, the Petitioner maintained that it demonstrated the *bona fides* of the job offer in the audit conducted by the DOL during the labor certification process. The Petitioner submitted a copy of a letter from DOL dated September 15, 2014, informing the Petitioner that its petition had been selected for audit, requesting the submission of a list of documents, and advising that the failure to submit such documentation would result in the denial of the labor certification application. The Petitioner also submitted a copy of its letter to the DOL's audit team, dated October 9, 2014, which listed all of the documents submitted in response to the audit notice. The DOL subsequently approved the labor certification application.

In denying the petition on March 10, 2020, the Director stated that the intention of the question at C.9 of the labor certification is to insure that the job opportunity is open to all workers, which would require an answer of "Yes" if there is any family relationship between the Petitioner and the Beneficiary. That answer would allow the DOL the opportunity to determine whether the family relationship influenced the openness of the job opportunity. The Director acknowledged the documentation relating to the DOL's audit that was submitted in response to the NOID, but claimed

[1] DOL issued a PERM FAQ on the interpretation of family relationship on July 28, 2014, noting in part: "A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, cousins of all degrees, aunts, uncles, grandparents and grandchildren are included. It also includes relationships established through marriage, such as in-laws and step-families. The term 'marriage' will be interpreted to include same-sex marriages that are valid in the jurisdiction where the marriage was celebrated."
*See* https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last accessed September 17, 2020).

that the Petitioner did not submit evidence to establish the outcome of the audit. The Director concluded that the Petitioner did not meet its burden of proof and that because the Beneficiary has a familial relationship with the Petitioner's co-owner the Petitioner did not establish that the proffered position was a *bona fide* job opportunity open to all workers.

On appeal the Petitioner asserts that the Director's analysis was faulty because it denied the petition on the sole ground that there is a familial relationship between the Petitioner and the Beneficiary without properly considering the record as a whole in determining the *bona fides* of the job opportunity. Of particular concern was the Director's conclusion that the Petitioner did not submit the outcome of the DOL audit, since the outcome of that audit was the approval of the labor certification application. We agree that the Director's analysis was faulty based on the facts in this case. The DOL conducted a fairly extensive audit to determine whether the labor certification application should be certified.[2,3] The record shows that the Petitioner submitted a comprehensive reply that addressed all of the documentary requests in the audit. The DOL was evidently satisfied that the audit response demonstrated that the job opportunity was open to all workers because the labor certification application was approved. The DOL's certification of the ETA Form 9089 was in fact the outcome of the audit which the Director mistakenly stated was not submitted by the Petitioner. Given the DOL's audit and approval of the labor certification, the Director's decision that the proffered position was not a *bona fide* job opportunity open to all workers is not well grounded. Accordingly, we will withdraw the Director's decision.

On the present record, however, we cannot sustain the appeal because there are evidentiary deficiencies concerning other issues, as discussed below.

B. Beneficiary's Experience

To qualify for classification as a skilled worker a beneficiary must have at least two years of training or experience. 8 C.F.R. § 204.5(l)(3)(ii)(B). A beneficiary must also meet the specific educational, training, experience, or other requirements of the labor certification. *Id.* All requirements must be met by the petition's priority date,[4] which in this case is April 15, 2014. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). Qualifying experience must be

[2] The DOL's audit requested extensive documentation of the Petitioner's recruitment process, including (1) the resumes and applications of all U.S. workers who applied for the position and a report with specific information about the step-by-step review of each application; (2) declarations from the employer and the foreign worker about whether the employer received any payments from the foreign worker or a third party in connection with the labor certification process, and documentary explanations of any such payments; (3) documentary evidence of the business necessity for the education, experience, training and/or other requirements for the proffered position; and (4) documentation explaining why the U.S. applicants for the proffered position were deemed not qualified and could not have become qualified after a reasonable time on the job.

[3] The family relationship in this case is somewhat attenuated and DOL had not issued its related FAQ prior to the filing of the labor certification application. DOL's FAQ now makes clear that even more attenuated relationships should be disclosed at C.9 of the ETA Form 9089 to allow the DOL to determine the *bona fides* of the job offer.

[4] The priority date of a Form I-140 petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

documented by letters from current or former employers providing the name, address, and title of the writer and a specific description of the duties performed. 8 C.F.R. § 204.5(g)(1).

The labor certification in this case states that the minimum experience required for the proffered position of print production supervisor is 24 months of work in a commercial print shop, and asserts that the Beneficiary met this requirement by working at a business called [redacted] in [redacted] Pennsylvania, from March 1, 2008, to May 15, 2010. The record indicates that this business, apparently no longer in operation, was owned by [redacted] the same relative of the Beneficiary who co-owns the Petitioner. As part of its initial evidence the Petitioner submitted a letter from [redacted] "to confirm that [the Beneficiary] was employed as a print shop worker from March 1, 2008 to May 15, 2010," along with a copy of one pay statement from January 2010.

In the denial decision the Director stated that the Beneficiary acquired work experience at [redacted] as alleged in the labor certification and the letter from [redacted] but made no formal finding as to whether that employment constituted qualifying experience. The Director simply concluded that because of the familial relationship between the Beneficiary and [redacted] the Beneficiary did not qualify for the proffered position.

Therefore, we will remand this case for the Director to determine whether the Beneficiary meets the minimum experience requirement of the labor certification and the requested visa classification. The Director may wish to request additional independent objective evidence from the Petitioner to verify prior employment as one pay statement would be insufficient to demonstrate a two year period of full-time employment.

C. Petitioner's Ability to Pay the Proffered Wage

To be eligible for the visa classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

In this case the proffered wage is $70,491 per year and the priority date is April 15, 2014. Thus, the Petitioner must establish its continuing ability to pay the proffered wage from April 15, 2014, up to the present.

The Director did not address the issue of the Petitioner's ability to pay the proffered wage in the denial decision. On remand, therefore, the Director shall also consider whether the evidence of

record establishes the Petitioner's continuing ability to pay the proffered wage. If deemed necessary, the Director may request additional evidence from the Petitioner.

## III. CONCLUSION

We will remand this case to the Director for further consideration of (1) whether the Beneficiary has the requisite experience to meet the terms of the labor certification and to qualify for skilled worker classification, and (2) whether the Petitioner has established its continuing ability to pay the proffered wage from the priority date of the petition onward. Upon determination of these issues the Director shall issue a new decision.

**ORDER**: The Director's decision of March 10, 2020, is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.