U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-P-H-, LLC

DATE: OCT. 4, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a restaurant, seeks to employ the Beneficiary as a food service worker. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center denied the petition on the ground that it was not supported by a valid labor certification. Specifically, the Director found that the worksite location indicated on the labor certification (ETA Form 9089, Application for Permanent Employment Certification) was not in the same Metropolitan Statistical Area (MSA) as the worksite location indicated on the Form I-140, Immigrant Petition for Alien Worker (petition), and that the Petitioner could not amend the petition after filing to change the worksite location to the one indicated on the labor certification.

On appeal, the Petitioner submits a brief and additional evidence. The Petitioner asserts that the worksite location entered on the Form I-140 petition was a clerical mistake which it should be allowed to rectify on appeal to conform to the correct worksite location indicated on the labor certification.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the entry of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section

[1] The date the labor certification is filed is called the "priority date." *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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.

A labor certification is valid only for the particular job opportunity and the area of intended employment stated on the Form ETA 9089, Application for Permanent Employment Certification (labor certification). 20 C.F.R. § 656.30(c)(2). "Area of intended employment" means the area within normal commuting distance of the address of intended employment. *Id.* A petition that is not accompanied by a valid labor certification is not considered properly filed and must be denied. *See* 8 C.F.R. § 204.5(a)(2), (k)(3)(i).

II. ANALYSIS

The Petitioner's Form I-140 petition was accompanied by a labor certification with a priority date of January 30, 2015. Section H of the labor certification, boxes 1 and 2, stated that the primary worksite (where the work is to be performed) is [redacted] in [redacted] Texas. The petition, however, stated that the address where the Beneficiary would be working is [redacted] in [redacted] Texas.[2]

The Director issued a request for evidence (RFE) which asked the Petitioner to show that the labor certification was still valid by submitting evidence that the worksite indicated on the petition is in the same MSA as the worksite indicated on the labor certification.

An MSA is "a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with that core." U.S. Census Bureau, *Metropolitan and Micropolitan*, https://www.census.gov/programs-surveys/metro-micro/about.html (last visited September 21, 2017). If two addresses are within the same MSA, they are considered to be within normal commuting distance of each other. *See* 20 C.F.R. § 656.3.

However, the fact that two worksites are in different MSAs does not necessarily mean that they are not within a normal commuting distance. Specifically, 20 C.F.R. § 656.3 states, in pertinent part:

> *Area of intended employment* means the area within normal commuting distance of the place (address) of intended employment. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g.,

[2] Other documentation in the record indicates that this road is actually called [redacted]

> normal commuting distances might be 20, 30, or 50 miles). If the place of intended employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of intended employment; however, not all locations within a Consolidated Metropolitan Statistical Area (CMSA) will be deemed automatically to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA or PMSA (or CMSA).

In response to the RFE the Petitioner asserted that the address entered on the Form I-140 petition was a "typographical error" and that the correct employment location for the Beneficiary was the address entered on the labor certification. The Petitioner submitted a new Form I-140 with the intended employment address changed to be the same address on the labor certification.

In his decision denying the petition, the Director noted that a labor certification is valid only for the area of intended employment stated on the labor certification, citing *Matter of Sunoco Energy Development Co. (Matter of Sunoco)*, 17 I&N Dec. 283 (Reg'l Comm'r 1979), and that a petitioner could not make material changes to a petition already filed to make it conform to USCIS requirements for eligibility and approval, citing *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r 1998).

Therefore, the Director did not accept the Petitioner's requested change to the petition and stated that the Petitioner had not submitted evidence establishing that the Texas, address identified as the primary worksite location in the petition is in the same MSA as the Texas, address identified as the primary worksite location in the labor certification.[3] The Director concluded that the labor certification was not valid for the employment location indicated in the petition, and denied the petition for lack of a valid labor certification.

On appeal the Petitioner reiterates its claim that designating the address in Texas, as the Beneficiary's primary worksite location was a clerical error, and that it always intended to employ the Beneficiary in The Petition submits a list of its business locations, which includes the two addresses in and that were entered on the labor certification and the petition, respectively. It also submits a copy of its job offer to the Beneficiary, issued shortly after the denial of the petition, identifying the worksite address as in Texas, as well as a statement from the Beneficiary, also dated after the denial of the petition, stating that he intends to work at the address and not at any other location.

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[3] and are approximately 230 miles apart via https://www.google.com/#q+distance+from (last visited September 18, 2017).

However, the petition, which was filed more than a year earlier, stated that the address where the Beneficiary would work was in Texas. The petition was signed by the petitioner's chief legal officer below a statement certifying that the petition was "true and correct." The petition was accompanied by an earlier job offer letter from the Petitioner in October 2015, which was signed by the chief financial officer in Texas, and did not clearly state that the Beneficiary would work at a restaurant in

The Petitioner contends that in *Matter of Izummi*, the petitioner was allowed to amend its petition by making certain changes to its partnership agreement. That case involved an immigrant investor under section 203(b)(5) of the Act who was allowed to amend some provisions of its partnership agreement that was submitted with its Form I-526 petition.

As for *Matter of Sunoco*, the Petitioner acknowledges that the petition was denied for lack of a valid labor certification because the job location indicated on the labor certification did not match the job location indicated on the petition. However, the Petitioner contends that the factual situation in *Sunoco* was different because not only was the beneficiary not employed at the location indicated on the labor certification, he also did not intend to work at that location, as the Regional Commissioner stated in finding the labor certification invalid. According to the Petitioner, the matter of intent distinguishes this case from *Matter of Sunoco* because the Beneficiary always intended to work at the location indicated in the labor certification, not the location in that was entered in the petition as a "clerical mistake."

The Director erred in concluding that the labor certification is not valid because the two worksites are not in the same MSA. As discussed above, it is a relevant factor, but it is not controlling. *See* 20 C.F.R. § 656.3 (a location outside of an MSA may be within normal commuting distance of a location that is near the border of the MSA). There is no rigid measure of distance which constitutes a normal commuting distance, because the concept of a normal commute may very among different areas. *Id.* Therefore, this decision is remanded to the Director to apply the correct standard for determining a normal commuting distance under 20 C.F.R. § 656.3.

The second issue is whether the Director erred by not permitting the Petitioner to amend its petition. As discussed above, the Director claimed it could not amend the petition under *Matter of Izummi*. However, *Matter of Izummi* involved a case under appeal after a decision had already been issued. In certain circumstances, the Director has the discretion to amend a Form I-140 petition prior to the issuance of the decision. For example the USCIS website states that "[a]lthough you may request that we change the visa classification to correct a clerical error in Part 2 of the form, we will make the final determination about whether to change the visa classification based on everything in your case." *Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker*, https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker (last visited September 25, 2017). The Petitioner does not cite to any law or USCIS policy that requires the Director to make such an amendment such that the Director could be found to have committed a reversible error by adjudicating the petition as filed by

the Petitioner. However, the Director is also not prohibited from correcting certain errors prior to the issuance of a decision.

Therefore, on remand, the Director should consider whether or not the Petitioner has established that the Texas, work location identified in the petition is a clerical or typographical error and whether he should make the requested change based on everything in the case.

In summary, we will withdraw the Director's decision and remand the case in order to determine whether the two worksites are within normal commuting distance in accordance with the test set forth at 20 C.F.R. § 656.3. In addition, the Director will also determine whether the Petitioner's requested change is a typographical or clerical error that, based on all of the facts of the case, merits amending the petition, or whether it appears that the Petitioner intended for the Beneficiary to work at the Texas, location when it filed the petition.

III. CONCLUSION

The Director's decision is withdrawn. The matter will be remanded for the Director to determine whether the different worksites stated on the labor certification and the petition are within normal commuting distance, and, if not, whether the Petitioner's requested change to the petition should be granted.

ORDER: The Director's decision is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of M-P-H-, LLC*, ID# 595574 (AAO Oct. 4, 2017)