MATTER OF A-D-T-, INC.

DATE: OCT. 24, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a dental office, sought to employ the Beneficiary as a prosthodontist.[1] It requested his classification as a member of the professions holding an advanced degree under the second-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows U.S. businesses to sponsor foreign nationals for lawful permanent resident status if they have master's degrees, or bachelor's degrees followed by five years of experience.

While the petition was pending, the Beneficiary left the Petitioner's employ and received a job offer from another dental office. Certain beneficiaries may change employers during the immigration process without jeopardizing the validity of their petitions. *See* section 204(j) of the Act, 8 U.S.C. § 1154(j). Here, however, the Director of the Texas Service Center denied the petition. The Director concluded that, as of the petition's filing, the Petitioner did not establish its required intention to employ the Beneficiary in the offered position. Thus, because the petition was invalid at filing, the Director found that it could not "remain valid" under section 204(j) of the Act.

On appeal, the Petitioner submits additional evidence and attributes the petition's denial to the alleged ineffective assistance of prior counsel. It also asserts that the petition remains valid under the "portability" provision of Section 204(j) of the Act.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further proceedings consistent with the following opinion.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer files a labor certification application with the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL must certify that the United States lacks able, willing, qualified, and available workers for an offered position, and that employment of a foreign national will not hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If the

[1] The record indicates that a prosthodontist is a dentist specializing in the replacement of teeth.

DOL approves the labor certification application, the employer then files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204(a)(1)(F) of the Act. Finally, if USCIS approves a 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. THE PETITIONER'S INTENTION TO EMPLOY THE BENEFICIARY

A business may file an immigrant petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the specifications on an accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, "live-in" basis). A petitioner must establish the *bona fides* of its job offer and meet all other petition requirements from a petition's filing date through its adjudication. 8 C.F.R. § 103.2(b)(1).

Here, the Petitioner's president stated the company's intention, as of the petition's filing on October 25, 2007, to employ the Beneficiary in the offered position of prosthodontist on a permanent, full-time basis. The Director, however, found that discrepancies of record regarding the Petitioner's claimed employment of the Beneficiary as a prosthodontist from 2003 to 2008 cast doubt on the president's credibility. The Director cited evidence that, contrary to the Petitioner's claim, the Beneficiary did not continuously work full-time for the company in the offered position during that period. On appeal, the Petitioner attributes the discrepancies to the alleged evidentiary omissions and inadequate explanations of prior counsel.

The Director's evidence, however, merits little weight. Before or during immigrant petition proceedings, a petitioner need not employ a beneficiary in an offered position. During those periods, a beneficiary need not even be physically present in the United States. Thus, here, the Petitioner's irregular employment of the Beneficiary from 2003 to 2008 does not establish its lack of intent to regularly employ him in the offered position in the future.

Moreover, the record shows that the Petitioner employed the Beneficiary full-time from at least 2004 to 2006, filed the labor certification application and the petition on his behalf, and stated its intention to employ him in the offered position. On appeal, the Petitioner also provides reasonable explanations, supported by evidence, for some of the inconsistencies of record.

In addition, the record otherwise supports the Petitioner's intention to employ the Beneficiary in the offered position. After the Beneficiary left the Petitioner in 2008, the record indicates its president's refusal to sign a job offer letter for him because the company no longer intended to employ him in the offered position. If the Petitioner had already misrepresented its intention to employ the Beneficiary at the petition's filing, the record does not explain why the Petitioner's president would refuse to do so again.

Contrary to the Director's findings, a preponderance of evidence supports the Petitioner's intention to employ the Beneficiary in the offered position as of the petition's filing.

III. THE PORTABILITY PROVISION

Despite the *bona fides* of the job offer as of the petition's filing, the Petitioner concedes that it no longer intends to employ the Beneficiary in the offered position. Nevertheless, the Petitioner asserts the petition's continued validity under the portability provision of section 204(j) of the Act, which would terminate its need to maintain the job offer through the petition's adjudication.

Under the portability provision, if beneficiaries' adjustment applications remain pending for at least 180 days, their petitions stay valid if they change jobs or employers and their new jobs are in the same or similar occupations as the original offered positions. Section 204(j) of the Act. The filer of a pending and potentially portable petition must demonstrate its eligibility from a petition's filing date until a beneficiary's adjustment application remained pending 180 days. 8 C.F.R. § 245.25(a)(2)(ii)(B)(2). Thus, to establish portability here, the Petitioner must demonstrate its intention to employ the Beneficiary in the offered position from the petition's filing date of October 25, 2007, until September 3, 2008, the 180th day of the pendency of his adjustment application.

The record establishes that the Beneficiary stopped working for the Petitioner on May 31, 2008. Thereafter, the record indicates that the Petitioner no longer intended to employ him in the offered position after that date. As such, the record does not appear to establish the Petitioner's intention to employ the Beneficiary for the required period after the petition's filing.

The Petitioner's claim of ineffective assistance of counsel, however, includes an assertion that its prior attorney should have informed the Beneficiary of his ability to simultaneously file his adjustment application with the petition. *See* 8 C.F.R. § 245.2(a)(2)(B) (allowing "concurrent filing" of a petition and a beneficiary's adjustment application). The Beneficiary filed his adjustment application approximately five months after the petition's filing. But, had he known of his ability to do so, the Beneficiary stated that he would have concurrently filed the application earlier. Thus, had the petition and the adjustment application been filed together before December 3, 2007, the Petitioner argues that the petition would have qualified for portability before the Beneficiary left the Petitioner on May 31, 2008.

The regulation at 8 C.F.R. § 245.25(a)(2)(ii)(B)(2) did not become effective until after the filing of this appeal. *See* USCIS Final Rule for Retention of EB-1, EB-2, and EB-3 Immigrant Workers, 81 Fed. Reg. 82398, 82398 (Nov. 18, 2016) (stating an effective date of Jan. 17, 2017). The Director therefore did not consider the Petitioner's intention to employ the Beneficiary during the required period after the petition's filing. The Director also did not consider the Petitioner's argument that, but for prior counsel's delay in filing the Beneficiary's adjustment application, the petition would have qualified for portability. We will therefore remand this matter for the Director's consideration of these issues.

On remand, the Director should review the entire record, including the materials submitted by the Petitioner on appeal. The Director should then issue a new decision. If the Director needs additional evidence to resolve these issues or identifies petition defects involving other issues, he must notify the Petitioner. In that case, he may issue a new decision only after affording the Petitioner a reasonable opportunity to respond.

IV. CONCLUSION

The record on appeal establishes the Petitioner's intention to employ the Beneficiary in the offered position as of the petition's filing. The Petitioner's claim that the petition remains valid under the portability provision of section 204(j) of the Act, however, requires further consideration of the petition's compliance with 8 C.F.R. § 245.25(a)(2)(ii)(B)(2) and the Petitioner's claim of ineffective assistance of counsel.

ORDER: The decision of the Director 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 A-D-T-, Inc.*, ID# 473612 (AAO Oct. 24, 2017)