U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7628088

Date: OCT. 26, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a cook under the third-preference immigrant classification for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Texas Service Center denied the petition. The Director concluded that the petition lacks required certification of the position by the U.S. Department of Labor (DOL).

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will reject the appeal.[1]

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain DOL certification. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* Labor certification also indicates that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to USCIS. *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a petition, a foreign national may finally 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.

[1] U.S. Citizenship and Immigration Services (USCIS) records indicate that this appeal was initially sent to an incorrect office and was not forwarded to the AAO until 2019. The AAO regrets the delay in the adjudication of the appeal.

II. THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for a skilled worker must include an original, valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). If an original labor certification was lost or destroyed, a petitioner may ask USCIS to request a duplicate copy from DOL. Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Ops., USCIS, HQ 76/6.2, *Revisions to Adjudicator's Field Manual (AFM). Chapter 22.2(b) General Form I-140 Issues*, 6 (Sept. 14, 2009). DOL will issue a duplicate labor certification only to the USCIS officer who requested it. *Id.; see also* 20 C.F.R. § 656.30(e)(1). "[W]hen the denial of the petition is based upon lack of a certification by the Secretary of Labor," we lack appellate jurisdiction. 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003); *see also* Department of Homeland Security Delegation Number 0150.1 (effective March. 1, 2003) (assigning appellate jurisdiction to us over the matters listed in former 8 C.F.R. § 103.1(f)(3)(iii)).

Here, the petition lacks an original labor certification. The Petitioner asked USCIS to request a duplicate certification from DOL, stating that "the original approved labor certification was never received in the mail." As proof of filing on January 15, 1998, the Petitioner submitted a copy of an uncertified DOL Form ETA 750, Application for Alien Employment Certification, Part A. Offer of Employment, in its name for the Beneficiary in the offered position. The Petitioner also submitted copies of correspondence between counsel and DOL regarding the application. The record, however, lacks a copy of Form ETA 750, Part B. Statement of Qualifications of Alien, which is the part of the labor certification application that would detail the Beneficiary's credentials for the offered position.

The Director's decision states that neither the DOL office in Atlanta nor Philadelphia could locate records of the Petitioner's labor certification application for the Beneficiary.[2] In a written request for additional evidence, the Director asked the Petitioner to provide copies of both Forms ETA 750, Part A and Part B. In response, the Petitioner asserted that its prior petition for the Beneficiary contained the requested documents. As previously indicated, however, the record lacks a copy of Form ETA 750, Part B, either with this or the Petitioner's prior petition.

On appeal, the Petitioner asserts that USCIS should have requested a duplicate labor certification from the DOL office in New York City that issued the document. The record, however, indicates that, before denying the Petitioner's prior petition for the Beneficiary in the same offered position, USCIS sent the New York City office multiple requests for a duplicate certification. DOL confirmed the Petitioner's filing of a certification application for the Beneficiary, providing a case number matching the one stated on a copy of a certification approval notice that the Petitioner submitted with its prior petition. The approval notice indicates that, after filing the prior petition for the Beneficiary, the Petitioner requested a duplicate certification directly from DOL. Dated in March 2004, the approval notice identifies the issuance as a "DUPLICATE CERTIFICATION" and

[2] After DOL officially closed its "backlog elimination centers" in Dallas and Philadelphia in December 2007, the agency's "national processing centers" in Atlanta and Chicago handled questions about labor certification applications filed before March 27, 2005. "DOL Issues FAQ Round 8 Regarding Backlog Elimination Centers," 85 No.1 INTERREL 25, Appendix V (Jan. 2, 2008).

states that DOL originally certified the application in April 2001. It appears that the duplicate was sent to Petitioner's former counsel. However, there is no indication that the duplicate was submitted to USCIS.

Although DOL apparently issued a duplicate labor certification to Petitioner's former counsel, the agency provided conflicting responses on whether it could issue one to USCIS. A May 2005 response states that the labor application "cannot be located by the archives," but that DOL can issue a duplicate certification if USCIS provides copies of Forms ETA 750, Parts A and B, filed by the Petitioner. A July 2005 response from a different DOL employee agrees that the application is not in the agency's archives, but states that "a duplicate certification cannot be issued."[3]

The Petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act. The record indicates that USCIS attempted multiple times to obtain duplicate copies of the labor certification from DOL. The record further indicates that DOL previously sent a duplicate copy of the certification to prior counsel. The Petitioner has not explained why it did not submit copies of the forms that DOL sent prior counsel, as specifically requested in the Director's RFE. *See* 8 C.F.R. § 103.2(b)(14) (stating that "[f]ailure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request"). Thus, as the Director found, the record lacks a required, complete labor certification. *See* 8 C.F.R. § 204.5(l)(3)(i). We therefore lack jurisdiction over the appeal and must reject the filing.

III. THE PETITIONER'S INTENTION TO EMPLOY THE BENEFICIARY

Even if the petition contained a complete labor certification, the record would not establish the Petitioner's required intention to employ the Beneficiary in the offered position. A U.S. business may file an immigrant petition if the business 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 accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis).

Here, the Petitioner states its intention to employ the Beneficiary full-time in the offered position of cook. Online government records, however, indicate that two corporations in the Petitioner's home

[3] The Director's decision misstates the date of the labor application's original certification. A copy of a letter from former counsel to the DOL office in New York City does not state that the office "certified" the labor application in March 2001, but rather that the office then received the application. At that time, state offices adjudicated certification applications and forwarded them to DOL offices for final reviews and decisions. *See* Final Rule for Applications for Permanent Employment Certification, 67 Fed. Reg. 77326, 77326 (Dec. 27, 2004) (outlining the labor certification process before new regulations took effect in March 2005). Thus, the record indicates that the DOL office in New York City received the Petitioner's application from a state office in March 2001 and certified the application the following month. Also, the Petitioner's request to USCIS for a duplicate certification misstates the petition's priority date. The copy of the certification approval notice identifies this petition's priority date as January 15, 1998, the date the state office received the certification application, not the April 2001 date on which DOL certified the application. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

state have used the Petitioner's trade name. One corporation is the Petitioner, which formed in 1997; the other incorporated in 2005. *See* N.J. Div. of Revenue & Enter. Servs., "Business Name Search," https://www.njportal.com/dor/businessnamesearch/ (last visited Sep. 28, 2020). The online records do not indicate whether the petitioning corporation remains active.

Corporations are distinct legal entities. *See, e.g., Matter of A. Dow Steam Specialties, Ltd.*, 19 I&N Dec. 389, 389 (Comm'r 1986) (finding that "the corporations are two separate entities"). Thus, the record does not establish whether the Petitioner or the more recently formed corporation intends to employ the Beneficiary in the offered position. If the more recently formed corporation intends to employ the Beneficiary, it must demonstrate its acquisition of the rights and obligations needed to carry on the Petitioner's business. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986) (discussing circumstances under which a "successor in interest" may use the labor certification of another entity).

Thus, the record would not establish the Petitioner's intention to employ the Beneficiary.

IV. ABILITY TO PAY THE PROFFERED WAGE

The record also would not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). If a petitioner employs less than 100 people, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

As previously noted, this petition's priority date appears to be January 15, 1998. The Petitioner submitted copies of its federal income tax returns for 2000 through 2005. Contrary to 8 C.F.R. § 204.5(g)(2), the Petitioner did not submit required evidence of its ability to pay "at the time the priority date is established" or in 1999. Also, the record lacks required evidence of the Petitioner's ability to pay since 2005.

In addition, a labor certification employer must guarantee that it will pay a foreign national the "prevailing wage" for the occupation when the alien begins work as a lawful permanent resident. *See* 20 C.F.R. § 656.20(c)(2) (2001).[4] The Petitioner here, however, appears to offer the Beneficiary less than the prevailing wage determined by DOL. The copy of the Form ETA 750 Part A submitted by the Petitioner indicates a DOL-approved, prevailing wage of $17.43 an hour for a 40-hour work week, or $697.20 a week. The Petitioner's Form I-140 and letter from its president state that the company would pay the Beneficiary only $650 a week. In addition, in support of the Beneficiary's application for adjustment of status, the Petitioner submitted a letter stating that it would pay him only $550 a week.

Thus, the record would not establish the Petitioner's ability to pay the proffered wage.

[4] DOL's current labor certification regulations apply only to applications filed on or after March 28, 2005. Final Rule for Applications for Permanent Employment Certification, *supra*, at 77326. As previously discussed, the record indicates the Petitioner's filing of its certification application in 1998. We therefore cite labor certification regulations as they existed at the time of the application's certification in 2001.

V. THE BENEFICIARY'S EXPERIENCE

The record also would not establish the Beneficiary's qualifying experience for the offered position and the requested visa classification. A skilled worker must perform "skilled labor (requiring at least 2 years training or experience)." Section 203(b)(3)(A)(i) of the Act. A petitioner must also demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the copy of the ETA Form 750 Part A submitted by the Petitioner states the minimum requirements of the offered position of cook as two years of experience in the job offered. The form states that neither training nor education is required. As previously discussed, the record lacks Form ETA 750, Part B, detailing the Beneficiary's qualifications for the position.

The letter from the Petitioner's president states the company's employment of the Beneficiary in the offered position from January 1, 1998, through May 5, 2006. The record does not indicate any other experience claimed by the Beneficiary.

As previously discussed, however, the petition's priority date appears to be January 15, 1998. Thus, the record indicates that, by the petition's priority date, the Beneficiary would have gained only 14 days of experience. Moreover, a labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience was in a position different than the offered one or the employer can demonstrate the impracticality of training a U.S. worker for the position. 20 C.F.R. § 656.21(b)(5) (2001). The Petitioner here indicated its employment of the Beneficiary in the offered position and did not demonstrate the impracticality of training a U.S. worker for the job.

Thus, the record would not have demonstrated the Beneficiary's qualifications for the offered position and the requested immigrant visa classification.

VI. CONCLUSION

As the Director found, the petition lacks a required, complete labor certification. We therefore lack jurisdiction over the appeal.

ORDER: The appeal is rejected.