U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-H-H-S- INC.

DATE: SEPT. 13, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a home health care provider, seeks to employ the Beneficiary as a registered nurse. It requests her classification 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 Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the position offered is a *bona fide* job opportunity open to U.S. workers. On appeal, the Petitioner submits additional evidence and asserts that Schedule A nurse petitions are exempt from seeking U.S. workers prior to filing the petition. Upon *de novo* review, we will sustain the appeal.

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified, and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified labor certification. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.[1] If USCIS approves the petition, the foreign national applies 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.

Here, the Director indicated in his decision that the Petitioner "did not submit evidence to support that there are no qualified U.S. workers available for the position prior to filing the Form I-140." He highlighted the Petitioner's certification of several conditions on the labor certification, including that the job opportunity has been and is clearly open to U.S. workers; that U.S. workers who applied for

[1] The priority date of the petition is January 15, 2019, the date the completed, signed petition was properly filed with USCIS. *See* 8 C.F.R. § 204.5(d).

the job opportunity were rejected for lawful job-related reasons; and that the job opportunity is for full-time, permanent employment for an employer other than the Beneficiary. He noted that the Beneficiary was interviewed and hired for the position before its notice of posting for the offered job was posted, and that these actions contradicted the Petitioner's attestations on the labor certification. He also highlighted the Petitioner's recruitment of foreign nurses and noted that there was no evidence that it recruited U.S. workers for the job. He therefore determined that the position being offered is not a *bona fide* job opportunity.[2]

However, as previously noted, because of the Schedule A designation for the occupation of professional nurse, the DOL has already determined that there are not sufficient U.S. workers who are able, willing, qualified, and available for the offered job in this case. The Petitioner's identification of the Beneficiary prior to the filing of the Schedule A petition and its lack of recruitment of U.S. workers for the offered job does not indicate the lack of a *bona fide* job opportunity. Rather, it indicates that the Petitioner adhered to DOL regulations in following Schedule A PERM[3] protocol after identifying a foreign national for the position. *See, e.g.,* 20 C.F.R. §§ 656.10, 656.15. A Schedule A filing must include evidence of prearranged employment for the Beneficiary. A test of the U.S. labor market is not required. Thus, the Director erred in denying the petition for lack of a *bona fide* job opportunity, and we will therefore withdraw the Director's decision.

The Director also appeared to find that the Petitioner intended to employ the Beneficiary outside the terms of the labor certification. A petitioner must be "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. It 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). However, because the Director did not support his finding with any relevant facts or analysis, we will withdraw the Director's decision on the issue of intent to employ the Beneficiary.

The Petitioner has established by a preponderance of the evidence that its Schedule A petition for the position of registered nurse is approvable. We will therefore sustain the appeal.

ORDER: The appeal is sustained.

Cite as *Matter of A-H-H-S- Inc.*, ID# 6059106 (AAO Sept. 13, 2019)

[2] Citing 20 C.F.R. § 656.10(c)(8), the Director stated that the labor certification employer must attest that "the job opportunity has ben and is clearly open to any U.S. worker." Citing *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*), he further stated that this "provision infuses the recruitment process with the requirement of a bona fide job opportunity; not merely a test of the job market."

[3] The regulatory scheme governing the labor certification process is referred to by the acronym PERM, for Program Electronic Review Management.