U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF MT- CORP.

DATE: SEPT. 20, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an operator of a convenience store, seeks to employ the Beneficiary as an assistant manager. It requests his classification under the third-preference, immigrant category as a professional. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A) (ii). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a bachelor's degree.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the *bona fides* of the job offer. Specifically, the Director found that the Petitioner omitted requested evidence of its efforts to recruit U.S. workers for the offered position and did not explain the job's need for a bachelor's degree.

On appeal, the Petitioner submits additional evidence. It argues that the Director "usurped" the role of the U.S. Department of Labor (DOL) by requesting documentation of its recruitment efforts and disregarded its explanation of the position's educational requirements.

Upon *de novo* review, we will withdraw the decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional 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)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and 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 labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (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 the 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.

II. BONA FIDES OF THE JOB OFFER

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 stated on an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming denial of a petition where, contrary to the terms of the accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis).

Here, the labor certification indicates the Petitioner's intention to permanently employ the Beneficiary in the full-time position of assistant manager. The labor certification states that the position requires a U.S. bachelor's degree or a foreign equivalent degree in business administration, and two years of experience in the job offered.

USCIS' written notice of intent to deny (NOID), however, alleged that, contrary to the terms of the labor certification, the position does not require a minimum educational requirement of a bachelor's degree. The NOID, for example, noted that an online DOL database indicates that candidates for most first-line supervisor positions in the retail sales industry do not need bachelor's degrees. *See* Occupational Information Network (O*NET), https://www.onetonline.org/link/summary/41-1011.00 (last visited Sept. 6, 2019). USCIS ultimately concluded that the Petitioner "did not respond as requested with information that would explain, or evidence to demonstrate, why they required a bachelor's degree for a position where one was not usually needed."

Contrary to USCIS' conclusion, the Petitioner's NOID response included evidence supporting the baccalaureate requirement. A letter from a company vice president described a degree as "a reasonable and necessary requirement for the position" because the job involves "the performance of many duties with little supervision." The Petitioner, however, did not need to justify its educational requirement. USCIS may only invalidate a labor certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d). Absent invalidation, however, the Agency "is bound by the DOL's certification." *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984). As previously indicated, Congress directed DOL to determine the availability of qualified U.S. workers and suitable wages for permanent positions offered to foreign nationals. Section 212(a)(5)(A)(i) of the Act. Job requirements of offered positions affect the availability of qualified candidates and the minimum wages required to protect U.S. workers in similar jobs. USCIS therefore may not question DOL-certified job requirements on labor certifications. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, USCIS did not invalidate the labor certification. The Agency did not specifically find that the Petitioner misrepresented job requirements or any other material facts on the labor certification. Thus, USCIS was bound by the job requirements stated on the labor certification and erred in questioning the position's need for a bachelor's degree.

For the foregoing reasons, the record does not support the petition's denial based on the *bona fides* of the job offer. We will therefore withdraw the Director's decision.

III. ABILITY TO PAY THE PROFFERED WAGE

The appeal overcomes the denial ground. But the record does not establish the petition's approvability. Although unaddressed by the Director, the Petitioner has not demonstrated its ability to pay the proffered wage.

A petitioner must demonstrate its 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). For petitioners who employ less than 100 people, like this Petitioner, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of assistant manager as $26.50 an hour, or $55,120 a year based on a 40-hour work week. The petition's priority date is August 24, 2018, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). As of the appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage in 2018, the year of the petition's priority date, was not yet available. Copies of the Petitioner's annual report, federal tax returns, or audited financial statements for 2018 should now be available. We will therefore remand the matter.

On remand, the Director should instruct the Petitioner to submit required evidence of its ability to pay the proffered wage in 2018. The Petitioner may also submit additional evidence of its ability to pay that year, including proof of any wages it paid to the Beneficiary and materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

If supported by the record, the Director may also notify the Petitioner of other potential grounds of denial. If the Director believes that the Petitioner fraudulently or willfully misrepresented a material fact on the labor certification application, his notice must include that specific allegation. The Director must also afford the Petitioner a reasonable opportunity to provide requested evidence or rebuttal argument. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

IV. CONCLUSION

The record does not support the petition's denial based on the *bona fides* of the job offer. But the Petitioner has not demonstrated its ability to pay the position's proffered wage from the petition's priority date onward.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of MT- Corp.*, ID# 6062839 (AAO Sept. 20, 2019)