U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-V-H-

DATE: SEPT. 21, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a hospital, seeks to employ the Beneficiary as a registered nurse. It requests her classification as a skilled worker under the third-preference, immigrant category. *See* Immigration and Nationality Act section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based 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 Nebraska Service Center denied the petition, concluding that the record did not support approval of the accompanying application for Schedule A designation.[1] On appeal, we affirmed the Director's decision, agreeing that the Petitioner did not obtain a prevailing wage determination, or post notice of the application's filing, consistent with DOL regulations.

On motion to reconsider, the Petitioner asserts that its prevailing wage determination meets regulatory requirements and that it properly posted notice of its filing of the Schedule A application.

Upon review, we will deny the motion to reconsider.

I. LAW

A motion to reconsider must establish that, based on the record at that time, our decision incorrectly applied law or policy. 8 C.F.R. § 103.5(a)(3). A petitioner must support a motion to reconsider with a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of USCIS or Department of Homeland Security policy. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

[1] Schedule A contains two occupations – physical therapist and professional nurse - that the U.S. Department of Labor (DOL) does not require prospective employers of foreign nationals to advertise in U.S. labor markets. *See* 20 C.F.R. § 656.5. The DOL has already determined that the United States lacks sufficient able, willing, qualified, and available workers for these occupations and that the employment of foreign nationals will not harm the wages and working conditions of U.S. workers in similar occupations. *Id.* The DOL has therefore authorized U.S. Citizenship and Immigration Services (USCIS) to adjudicate Schedule A applications in immigrant visa proceedings. *See* 20 C.F.R. § 656.15.

II. THE PREVAILING WAGE DETERMINATION

An application for Schedule A designation must include a prevailing wage determination obtained from a state workforce agency (SWA) pursuant to DOL regulations. 20 C.F.R. § 656.15(b)(1). An employer must file its Schedule A application within the validity period of a prevailing wage determination. 20 C.F.R. § 656.40(c).

In this case, the Petitioner filed the petition and Schedule A application on May 1, 2006, without a prevailing wage determination from a SWA. On appeal, however, the Petitioner submitted a wage determination, valid from July 20, 2007, to June 30, 2008.

Contrary to 20 C.F.R. § 656.40(c), however, the Petitioner did not file its Schedule A application within the validity period of the prevailing wage determination. Rather, it filed the application more than a year before the wage determination became valid. The Petitioner therefore did not comply with DOL regulations in obtaining its prevailing wage determination.

On motion, the Petitioner notes that, consistent with 20 C.F.R. § 656.40(c), its prevailing wage determination remained valid for more than 90 days and less than a year. As indicated above, however, the regulation also requires an employer to file its Schedule A application within the validity period of the wage determination. Contrary to DOL regulations, the Petitioner did not file its Schedule A application during the validity period of the wage determination and therefore did not establish its eligibility for the benefit sought. We will therefore affirm our appellate decision.

III. THE NOTICE OF FILING

An application for Schedule A designation must also include evidence that, consistent with DOL regulations, an employer provided notice of the application's filing to its employees or their bargaining representative. 20 C.F.R § 656.15(b)(2). If no bargaining representative exists, an employer must post a filing notice at the worksite for at least 10 consecutive business days. 20 C.F.R. § 656.10(d)(1)(ii). "In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures for the recruitment of similar positions in the employer's organization." *Id.*

Here, the petition included a filing notice indicating its posting at the worksite for more than 10 consecutive business days. Contrary to instructions in the Director's request for evidence, however, the Petitioner did not indicate whether it published the notice in all, applicable in-house media consistent with DOL regulations.

On appeal, the Petitioner submitted another filing notice and a letter from its human resources director. Neither of these documents, however, indicates the Petitioner's publishing of the filing notice in all applicable, in-house media. Also, contrary to DOL regulations, the Petitioner posted the second notice after its filing of the Schedule A application. *See* 20 C.F.R. § 656.10(d)(3)(iv) (requiring posting of a filing notice between 30 and 180 days *before* an application's filing).

We also note on reconsideration that, contrary to DOL regulations, both of the Petitioner's filing notices state wage rates below the proffered wage of $28.59 an hour, and below the prevailing wage of $23.65 an hour. *See* 20 C.F.R. § 656.10(d)(4) (requiring a filing notice to "state the rate of pay (which must equal or exceed the prevailing wage rate entered by the SWA on the prevailing wage request form)"); *see also* 20 C.F.R. §§ 656.17(f)(5), (7) (barring posting notices and print advertisements from containing wage rates lower than the prevailing wage, or less favorable than those offered to the foreign national).

For the foregoing reasons, the Petitioner's filing notice of the Schedule A application did not comply with DOL regulations. For this additional reason, we will affirm our appellate decision.

IV. OTHER ISSUES

On reconsideration, we also note the petition's following deficiencies.

A. The Petitioner's Ability to Pay the Proffered Wage

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). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

Here, as previously indicated, the Schedule A application states the proffered wage of the offered position of registered nurse as $28.59 an hour. The petition's priority date is May 1, 2006, the date of the petition's filing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

Contrary to 8 C.F.R. § 204.5(g)(2), the Petitioner did not submit required evidence of its ability to pay the proffered wage from the petition's priority date onward. In addition, USCIS records indicate the Petitioner's filing of at least 12 petitions for other beneficiaries that remained pending or approved after this petition's priority date.[2]

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and the other petitions that remained pending or approved after its priority date. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming the revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple, pending petitions).

[2] USCIS records identify the other petitions by the following receipt numbers: [redacted] and [redacted].

In any future filings in this matter, the Petitioner must submit regulatory required evidence demonstrating its ability to pay the combined proffered wages of the applicable beneficiaries from this petition's priority date onward.

B. The Beneficiary's Qualifying Experience

A petitioner must demonstrate a beneficiary's possession, by a petition's priority date, of the minimum job requirements stated on an accompanying labor application. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the Schedule A application states the minimum job requirements of the offered position of registered nurse as including at least one year of experience in the job offered. On the application, the Beneficiary attested that she gained experience in the job offered with the Petitioner. She did not state any other qualifying experience. In a letter, the Petitioner's human resources director stated that the hospital began employing the Beneficiary as a registered nurse on October 4, 2005.

As of the petition's priority date of May 1, 2006, the record does not establish the Beneficiary's possession of at least one year of experience in the job offered. As of that date, the record indicates the Petitioner's employment of the Beneficiary for less than one year. The record lacks evidence of her possession of any other qualifying experience. In any future filings in this matter, the Petitioner must establish the Beneficiary's possession of at least one year of experience in the job offered by the petition's priority date. The Petitioner must also explain the omission of any other qualifying experience from the labor application.

C. The Validity of the Schedule A Application

A business may use another employer's labor certification only if it establishes itself as that employer's successor in interest. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) (requiring a successor to demonstrate its acquisition of the rights and obligations needed to continue operation of an employer's business).

Here, online public records indicate that, while this motion was pending, a company acquired the Petitioner. *See* at http://www. (last visited Aug. 24, 2017). The record does not establish whether the Petitioner's new owner or the Petitioner intends to employ the Beneficiary in the offered position. If the Petitioner's new owner will employ the Beneficiary, the record does not establish it as the Petitioner's successor in interest.

In any future filings in this matter, the Petitioner must indicate which entity intends to employ the Beneficiary in the offered position. If the Petitioner's new owner will employ her, it must establish itself as the Petitioner's successor.

V. CONCLUSION

The record does not support approval of the petition's accompanying application for Schedule A designation. Thus, the record does not establish that our dismissal of the Petitioner's appeal incorrectly applied law or policy. We will therefore affirm our appellate decision.

ORDER: The motion to reconsider is denied.

Cite as *Matter of N-V-H-*, ID# 746375 (AAO Sept. 21, 2017)