U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-T-S-, INC.

DATE: SEPT. 28, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of software development and consulting services, seeks to employ the Beneficiary as a programmer analyst II. It requests 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 at least five years of experience.

The Director of the Nebraska Service Center denied the petition and the Petitioner's following, combined motions to reopen and reconsider. The Director concluded that, contrary to regulations, the labor certification accompanying the petition had expired.

On appeal, the Petitioner submits additional evidence and asserts its filing of the labor certification in support of the petition within the certification's validity period.

Upon *de novo* review, we will dismiss the appeal.

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). DOL must certify that the United States lacks able, willing, qualified, and available workers for an offered position. Section 212(a)(5)(A)(i)(I) of the Act. The agency must also certify that employment of a foreign national will not hurt the wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i)(II) of the Act.

If DOL certifies a position, the employer must file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. In visa petition proceedings, a petitioner must demonstrate, among other things, a beneficiary's possession of the DOL-certified job requirements. 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 VALIDITY OF THE ACCOMPANYING LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage position, a petition for an advanced degree professional must be filed with a valid labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification expires if, within 180 days of its approval, it is not filed in support of a petition. 20 C.F.R. § 656.30(b)(1).

In this case, the labor certification and petition were not filed prior to the labor certification's expiration. The labor certification stated its expiration on May 7, 2016, which was a Saturday. Therefore, under USCIS policy, the labor certification did not expire until Monday, May 9, 2016.[1]

A review of the record shows that the Petitioner submitted the petition and labor certification directly to the Nebraska Service Center on May 6, 2016. However, because the Petitioner did not request "premium," 15-day processing, USCIS instructions required the petition's filing at a "lockbox" facility in Texas. *See* USCIS, Direct Filing Addresses for Form I-140, Immigrant Petition for Alien Worker, at https://www.uscis.gov/i-140-addresses#Alone (last visited Aug. 11, 2017). Because the Petitioner did not submit the petition at the designated filing location, the petition was not filed on May 6, 2016. Rather, the record indicates that the service center forwarded the petition to the lockbox facility, which received it on May 11, 2016. A petition is only properly filed when it is received "at the location designated for filing." *See* 8 C.F.R. § 103.2(a)(7)(i) (stating filing requirements). The petition, therefore, was filed on May 11, after the labor certification's expiration.

On appeal, the Petitioner acknowledges that current USCIS instructions require the petition's filing at the lockbox facility. But the Petitioner asserts that, as of the petition's submission in May 2016, USCIS instructions required its filing at the service center. The record, however, lacks documentary evidence supporting the Petitioner's assertion. USCIS records identify the Texas lockbox facility as the designated filing location for all EB-2, I-140 petitions (except those requesting premium processing) since August 2010. *See* USCIS News Release, "Change of Filing Location for Form I-140, Immigrant Petition for Alien Worker," Aug. 3, 2010, at https://www.uscis.gov/archive/archive-news/change-filing-location-form-i-140-immigrant-petition-alien-worker (last visited Aug. 11, 2017). We therefore reject the Petitioner's assertion that USCIS instructions required the petition's filing at the Nebraska Service Center.

The Petitioner notes that the service center should have rejected the company's petition as improperly filed. The USCIS news release cited above stated: "After Sept. 17, 2010, petitions improperly filed at the USCIS Service Centers will be returned to the petitioner as improperly filed, with instructions to send the petition to the correct location." But the record does not establish that the service center's acceptance and transfer of the petition caused the labor certification's expiration.

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[1] *See* USCIS *Adjudicator's Field Manual*, § 22.2(b)(3)(F)(ii), at https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-1.html (continuing a labor certification's validity period until the next business day if the period ends on a weekend or holiday) (last visited Aug. 14, 2017).

Had the service center rejected the May 6 submission, the Petitioner would not likely have received the returned petition until on or after the May 9 expiration date of the labor certification. Upon receiving the rejected petition, the Petition would have also had to send it to the lockbox facility, delaying its filing by another day.

The Petitioner also asserts that, before denying the petition, the service center should have issued a notice of intent to deny. The Petitioner argues that, by denying the petition without prior notice of its defect, the service center deprived the company of an opportunity to respond. The record, however, does not establish that the issuance of a notice of intent to deny would have prevented the labor certification's expiration. Rather, the record indicates that the certification would have expired before the Petitioner could have responded to a notice. Moreover, USCIS regulations allow for denial of a defective petition without prior notice. *See* 8 C.F.R. § 103.2(b)(8)(i) (stating: "If the record evidence establishes ineligibility, the benefit request will be denied on that basis").

For the foregoing reasons, the record does not establish the validity of the accompanying labor certification. We will therefore affirm the Director's decision.

III. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the Petitioner also did not demonstrate its 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, the labor certification states the annual proffered wage of the offered position of programmer analyst II as $78,000. The petition's priority date is April 21, 2015, the date the DOL received the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner submitted copies of its federal income tax returns for 2014. But the record lacks required evidence of the Petitioner's ability to pay in 2015, the year of the petition's priority date, or thereafter. In any future filings in this matter, the Petitioner must submit copies of annual reports, federal tax returns, or audited financial statements for 2015 and 2016.

Also, USCIS records indicate the Petitioner's filing of at least 12 other petitions 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

[2] USCIS records identify the 12 other petitions by the following receipt numbers: [redacted] and [redacted]

the combined proffered wages of this and the other 12 petitions that remained pending or approved. The Petitioner must demonstrate its ability to pay the combined proffered wages from this petition's priority date until the other beneficiaries obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming a petition's revocation where the petitioner, as of the filing's grant, did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries).

In any future filings in this matter, the Petitioner must provide the proffered wages of its 12 other, pending petitions. The Petitioner should also submit evidence of any: wages it paid the other beneficiaries; lawful permanent resident status they obtained; and denials, withdrawals, or revocations of their petitions.

IV. CONCLUSION

The record does not establish the validity of the accompanying labor certification. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of I-T-S-, Inc.*, ID# 703331 (AAO Sept. 28, 2017)