U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12261310

Date: SEPT. 30, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a computer systems analyst. It requests classification of the Beneficiary as a professional under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This immigrant visa category allows a U.S. employer to sponsor a professional with a bachelor's degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition. The Petitioner filed a combined motion to reopen and motion to reconsider. The Director granted the motion and then denied the reopened petition. The Director's decision concluded that the Petitioner did not establish that it had a full-time, permanent job opportunity as a computer systems analyst for the Beneficiary.

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

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant visa category, and that the employer has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). In this case, the priority date is July 23, 2018.[1]

[1] For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. OFFERED POSITION

The Petitioner describes itself as a technology job portal and technology professional services business. The company was established on [redacted] 2006. On the petition, the Petitioner claimed to have 41 employees and annual revenues of approximately $8.3 million.[2]

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien entitled to immigrant classification under the Act may file a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); *see* 8 C.F.R. § 204.5(c). Such petitions must be accompanied by a labor certification from the DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5); *see also* 8 C.F.R. § 204.5(l)(3)(i). The 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 denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary under the terms of the labor certification); s*ee also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where the labor certification did not remain valid for the intended geographic area of employment). Because the filing of a labor certification establishes a priority date for any immigrant petition later based on the labor certification, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The *bona fides* of the job opportunity are essential elements in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Further, the Act requires USCIS to determine eligibility for the visa classification requested. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Certain classifications require a labor certification to establish eligibility. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 204.5(l)(3)(i). Section 204(b) of the Act allows a petition's approval only after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b). For those petitions requiring a labor certification, USCIS' investigation into the facts must include consultation with DOL. *Id*. Thus, the labor certification is not conclusive evidence of eligibility. Instead, it is a pre-condition to being eligible to file a Form I-140. USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. §103.2(b)(i). USCIS is required to approve an employment-based immigrant visa petition only where it is determined that the facts stated in the petition, which incorporates the labor

[2] The Petitioner's claimed gross income is corroborated by its 2018 Form 1120S, U.S Income Tax Return for an S Corporation. The tax return also states that the Petitioner had $4.5 million in salary expenses, $493,629 in net income, and $401,773 in net current assets.

certification, are true and the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b).

In short, the Petitioner must establish its intent and ability to employ the Beneficiary in a permanent, full-time position in accordance with the terms and conditions specified in the labor certification and the requested immigrant visa category.

In this case, the petition states that the Beneficiary is being offered the position of computer systems analyst. The record contains an agreement for the Petitioner to provide IT services to an end-client via an intermediary company. The requirements of the offered position are set forth at section H of the labor certification:

H.4. Education: Bachelor's degree in computer science, information technology, science, or equivalent.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.11. Job duties: Identifying, writing and managing business requirements; contributing to the functional and technical design, prototyping, and process design stages of implementations (including scenario design, flow mapping); supporting configurations, customization, reports and interfaces, testing and user training; expand or modify system to serve new purposes or improve work flow; test, maintain, and monitor computer programs and systems, including coordinating the installation of computer programs and systems; develop, document and revise system design procedures, test procedures, and quality standards; provide staff and users with assistance solving computer-related problems, such as malfunctions and program problems; review and analyze computer printouts and performance indicators to locate code problems, and correct errors by correcting codes; consult with management to ensure agreement on system principles; confer with clients regarding the nature of the information processing or computation needs a computer program is to address; read manuals, periodicals, and technical reports to learn how to develop programs that meet staff and user requirements; coordinate and link the computer systems within an organization to increase compatibility and so information can be shared; and determine computer software or hardware needed to set up or alter system.
H.14. Specific skills or other requirements: Oracle eBusiness suite R12 application and Oracle Cloud R11 application, MS Visio, MS Project, Oracle SQL, PL/SQL, Windows, Oracle, Linux.

The Director's decision denying the petition states that the record of proceeding contains inconsistencies that undermine the Petitioner's assertion that it has a full-time, permanent position of computer systems analyst for the Beneficiary. First, the Director states that the contract to provide IT services has the following issues:

- The contract is only valid for a few months and not years as the Petitioner represented in its response to the notice of intent to deny (NOID);
- According to the contract, the Beneficiary would provide services to the end-client on an "as-

needed basis" and that she would work 40 hours per week "or as otherwise determined," meaning that the Petitioner did not appear to be making a full-time job offer of employment;
- The "Statement of Work" accompanying the contract states that the position is for a "Tableau developer" and not a computer systems analyst;[3] and
- Neither the Statement of Work nor the contract contains the special skills listed at section H.14 of the labor certification.

The Director also noted that the Petitioner's website does not state anywhere that the company provides IT consulting services. Instead, the Petitioner's website is an online job board for various employers to post job openings and for tech workers to find jobs at other companies. The Petitioner's website also states that the company provides services such as migrating paper resumes into an online system, generating custom reports, job advertisement distribution, and creative writing for job advertisements.[4]

For these reasons, the Director concluded that the Petitioner did not establish that it was offering the Beneficiary a full-time, permanent job opportunity as a computer systems analyst.

On appeal, the Petitioner claims that USCIS violated its Constitutional due process rights because USCIS did not provide the Petitioner with an opportunity to address several of the grounds of the Director's decision. However, the Petitioner did not specify which grounds it did not have an opportunity to respond to prior to the Director's decision. Further, the documents in the record of proceeding show that the Petitioner had prior notice of the issues addressed in the Director's decision as well as an opportunity to respond to them during the adjudication of the petition and the subsequent motion.

The Petitioner also asserts that the Director's findings are not relevant to this case. The Petitioner claims that it is only required to submit an approved labor certification and establish its ability to pay the proffered wage. This is incorrect. As is discussed above, the Petitioner must establish, among other things, its ability to employ the Beneficiary in a full time, permanent position in accordance with the terms of the labor certification. We find that the Director's decision contains grounds of denial that are material to the Petitioner's eligibility for the requested benefit.

In response to the Director's conclusion that the terms of the contract (i.e., that the Beneficiary would provide services on an "as-needed basis" and would work 40 hours per week "or as otherwise determined") are inconsistent with the Petitioner's claim that it intends to employ the Beneficiary on a permanent, full-time basis, the Petitioner claims that it is standard for contracts in the IT services industry to have limited terms and include provisions like those identified in the Director's decision in order to give the client maximum flexibility. Even if a contract is for a shorter term, the Petitioner claims that these contracts are often renewed. The Petitioner also states that if the end-client did not use the Beneficiary 40 hours a week, the Petitioner would nonetheless continue to pay the Beneficiary

[3] According to https://www.tableau.com, Tableau is a software program used by businesses to visualize and analyze data.

[4] The Director also noted inconsistencies in the addresses provided by the Petitioner. The Director stated that the Business Tax Certificate has a suite number of 212, but all other documents use suite 202. In addition, the Petitioner's lease for its prior office address has a zip code that is different than the other documents in the record. We conclude that these are most likely typographical errors and are not material evidence of whether or not the Petitioner has a full-time, permanent computer systems analyst position for the Beneficiary.

and find additional work for her. However, the Petitioner did not submit sufficient evidence in support of these claims. For example, the Petitioner did not establish that the contract has a history of being extended. Further, with only one worksite listed on the petition, the Petitioner also did not provide evidence that it had similar work involving the same job duties in-house or for another project upon completion of the end-client's current project.

As for the Director's claim that the special skills listed at section H.14 do not match with the Statement of Work, the Petitioner asserts that the labor certification relates to a future position when the Beneficiary obtains lawful permanent residence and that the special skills do not need to be addressed in the current Statement of Work.[5] However, the Petitioner does not demonstrate how it will have future IT services contracts that will utilize those skills.

Regarding its website not mentioning that the company regularly provides IT consultant services, the Petitioner's appeal brief did not address the actual issue raised by the Director: namely that it did not appear that the Petitioner was in the business of providing IT staffing services and therefore it did not appear that the Petitioner had full-time openings for IT consultants. The Petitioner stated that the Director did not seem to understand the IT services industry and that there are a variety of possible positions in IT consulting, such as part-time, full-time, short term and long term. However, the Petitioner did not establish that it regularly provided IT contract services such that the Director could conclude that it was more likely than not that a computer systems analyst position with the duties and requirements set forth on the labor certification would be available to the Beneficiary upon the issuance of lawful permanent residence.

In this case, the Director raised several inconsistencies that led to the conclusion that the Petitioner did not have a full-time, permanent employment for the Beneficiary in the specific position set forth on the labor certification. The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the record does not contain sufficient independent, objective evidence of the Petitioner's ability to employ the Beneficiary on a permanent, full-time basis for the position described on the labor certification.[6]

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[5] This contradicts the Petitioner's president's statement in the petition and NOID response that it is possible that the Beneficiary will work in the same location indefinitely because the contract is "long-term and will carry on for several years."

[6] If the Petitioner files a new immigrant visa petition on behalf of the Beneficiary, it should address the inconsistences in the record relating to the Beneficiary's employment history. Section K of the labor certification states that the Beneficiary was employed as a full-time Tableau developer with [redacted] from October 1, 2013 until the July 23, 2018 labor certification filing date. Although the instructions to section K state that the labor certification should list any other experience that qualifies the Beneficiary for the job opportunity, this is the only position listed on the labor certification. However, the Beneficiary's resume and employment letters state that the Beneficiary worked as a reports developer for [redacted] from November 2014 until February 2016. The evidence in the record also does not explain the overlap in employment with [redacted] ending December 2014 and [redacted] beginning November 2014. The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho* at 591-92.

III. CONCLUSION

The Petitioner did not establish that it would employ the Beneficiary in a permanent, full-time position in accordance with the terms and conditions specified in the labor certification.

ORDER: The appeal is dismissed.