U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22727727

Date: AUG. 24, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

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

The Director of the Texas Service Center denied the petition. The Director concluded that the record did not establish that a bona fide job offer open to U.S. workers existed because a pre-existing relationship between the Beneficiary and the Petitioner was not revealed on the labor certification. Furthermore, the Director found that the Petitioner willfully misrepresented a material fact by failing to disclose the pre-existing friendship between its president/co-owner's spouse and the Beneficiary's spouse on the labor certification.

On appeal the Petitioner contests the Director's findings, asserting that the Director misconstrued the facts and misapplied the law.

The AAO reviews the questions in this matter de novo. See Matter of Christo 's Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015). It is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. See Section 291 of the Act, 8 U.S.C. § 1361; Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010). To establish its eligibility for the immigration benefit it seeks under the preponderance of the evidence standard, the petitioner must submit sufficiently probative and credible evidence to establish that its claim is "more likely than not" or "probably" true. See Matter of E-M-, 20 I&N Dec. 77, 79-80 (Comm'r 1989).

Upon de novo review, we determine that the Petitioner has established, by a preponderance of the evidence, that the proffered position was a bona fide job opportunity open to U.S. workers and that applicable regulations were not violated in the labor certification process. Accordingly, we will withdraw the Director's decision. We will remand the case for adjudication within the statutory and regulatory framework for 1-140 immigrant visa petitions.

I. LAW

Employment-based immigration generally follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. Id. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id. 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 classification, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5.[1] 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. ANALYSIS

The Petitioner is a printing business that was established in 2009 and has approximately seven employees. The instant petition was filed with USCIS on December 28, 2020, accompanied by a labor certification that was filed with the DOL on March 17, 2020, and certified on July 21, 2020. The petition was denied on October 8, 2021.

With respect to the basis for the Director's decision, the Petitioner's assertions on appeal are persuasive. The Petitioner must prove eligibility by a preponderance of evidence, such that the applicant's claim is "probably true" based on the factual circumstances of each individual case. Matter of Chawathe; Matter of E-M-. We find that the Petitioner has met that burden with respect to the Director's findings. Accordingly, we will withdraw the Director's decision.[2]

In section N of the labor certification (Employer Declaration), the Petitioner certified 10 conditions of employment for the proffered position of business intelligence consultant, one of which was: "The job opportunity has been and is clearly open to any U.S. worker." This certification, accorded with the regulation at 20 C.F.R. § 656.10(c)(8), requires an employer to attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." The petitioner has the burden of establishing that a bona fide job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. See Matter of Amger Corp., 87-INA-545 (BALCA 1987); see also 8 U.S.C. § 1361.

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[1] 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). 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). In this case, the priority date is March 17, 2020.

[2] We recognize that that the Director raised significant if somewhat speculative concerns. While not sufficiently developed for purposes of this visa petition, the Director is not barred from further inquiry, investigation, or the development of questions for consular processing or adjustment of status proceedings. See Matter of 0, 8 I&N Dec. 295 (BIA 1959) (stating that the immigrant visa petition is not the appropriate stage of the process for questions regarding admissibility).

In denying the petition, the Director stated that:

> the [P]etitioner contends that he and the [B]eneficiary are not friends, nor have they been friends or acquaintances in the U.S. or abroad in their home country of [redacted] Venezuela. However, the [P]etitioner and [B]eneficiary's spouses are friends and have had a long-lasting friendship prior to the newly created position. And it so happens that the only qualified candidate to apply for this position was the [B]eneficiary.

The Director further states that although the Petitioner went through the necessary steps to obtain a labor certification, "[i]t appears that the [P]etitioner intends to employ the [B]eneficiary outside the terms of the labor certification. Therefore, the evidence does not show that the [P]etitoner made a bona fide job offer to the [B]eneficiary, or that the [P]etitioner desires and intends to employ the [B]eneficiary in the offered position." The Director cites to Matter of Sunmart, 374, 2000-INA-93 (BALCA May 15, 2000) stating that "[a] relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by 'blood' or it may 'be financial, by marriage, or through friendship.'" The Director cites to Matter of Sunmart but does not sufficiently explain how the case is applicable to the instant case. [3]

The Director based the decision on evidence in the record, including sworn statements from the Petitioner's president/co-owner, the Beneficiary, and their respective spouses indicating that the spouse of the Beneficiary and the spouse of the Petitioner's president/co-owner had a pre-existing friendship since 2016, and such relationship was not revealed to DOL during the labor certification process. The Director pointed out that the Petitioner did not reveal this friendship between the spouses when submitting the labor certification to DOL by answering "No" to the compound question on page 1, item C.9, of the labor certification which reads: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" The Director also pointed out that Petitioner did not reveal the spousal friendship when submitting this petition, and it was only later revealed when the Petitioner replied to a request for evidence notice. The Director found an issue with "the manner in which the [B]eneficiary was introduced to the [P]etitioner and the fact that a pre-exisitng friendship between the spouses of the [P]etitioner and [B]eneficiary was not disclosed to the DOL during the labor certification process."

A pre-existing friendship relationship between the spouses of the Beneficiary and the Petitioner's president/co-owner, however, appears to be beyond the scope of the question at C.9, and a failure to disclose it does not demonstrate that the job offer at issue was not open to U.S. workers. The question at C.9 does not ask whether a relationship exists based on friendship, but instead asks specifically whether there is familial relationship between the Beneficiary and anyone associated with the Petitioner, or whether the Beneficiary has an ownership interest in the Petitioner.[4] Therefore, the Petitioner answering "No" to question C.9 is correct based on the record as currently constituted.

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[3] The Petitioner distinguished Matter of Sunmart, by pointing out that in that case, the beneficiary was suspected of being a part owner of the petitioning business, thereby possibly having a controlling interest in the petitioner. The petitioner in Matter of Sunmart failed to turn over requested relevant business records to demonstrate the petitioner's ownership interests.

[4] On July 28, 2014, the DOL's Office of Foreign Labor Certification provided guidance for the PERM Program definition

We therefore withdraw the Director's finding on this issue. For the same reasoning, we withdraw the Director's finding that the Petitioner made a willful misrepresentation of a material fact.

However, we note that the record, as currently constituted, does not establish the Petitioner's continuing ability to pay the proffered wage from the priority date of the petition onward. 8 C.F.R. § 204.5(g)(2). In this case, the proffered wage is $65,354 per year and the priority date is March 17, 2020. The Petitioner submitted a copy of its 2019 federal income tax return. The record does not contain evidence of the Petitioner's ability to pay the proffered wage for 2020 onward. Without the necessary financial documentation, we are unable to determine the Petitioner's continuing ability to pay the Beneficiary's proffered wage based on its net income or net current assets from the priority date of March 17, 2020, onward.

Therefore, we will remand this case for the Director to request the submission of regulatory required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2), for the priority date year of 2020 and any subsequent year(s) in the Director's discretion. The Director may also request any other evidence that may be deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's eligibility for the immigration benefit it seeks on behalf of the Beneficiary.

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

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of familial relationship when responding to question C.9 of the labor certification, "A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, cousins of all degrees, aunts, uncles, grandparents and grandchildren are included. It also includes relationships established through marriage, such as in-laws and step-families." DOL, Employment & Training Administration, Foreign Labor Certification, OFLC Frequently Asked Questions and Answers, PERM Program, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm.