U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20930573

Date: JUL. 13, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a dental office, seeks to employ the Beneficiary as an administrative assistant. It requests skilled worker classification for the Beneficiary under the third-preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Nebraska Service Center initially approved the petition, but later revoked the approval, concluding that the record did not establish that the offered position was for full-time employment, and that it was available to U.S. workers.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (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). Upon *de novo* review, we will withdraw the Director's decision and remand this matter for the entry of a new decision consistent with the following discussion.

I. LAW

Employment-based immigration 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 certification from the U.S. Department of Labor (DOL). *See* 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*.

If DOL approves a position, an employer must next submit the certified labor application 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves

the 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. ANALYSIS

As noted above, the Director initially approved this petition, but after an onsite inspection conducted at the Petitioner's office, he issued a notice of intent to revoke (NOIR) which focused on the amount of hours the Beneficiary was working for the Petitioner at the time, as well as the nature of those duties.

A. Full-time Position

An employer must offer permanent, full-time employment to a beneficiary on whose behalf an application for labor certification has been filed. 20 C.F.R. § 656.3. Here, the Petitioner indicated in the labor certification as well as in Part 6, question 4 of Form I-140 that the position of administrative assistant was full-time. During the subsequent onsite inspection, the Petitioner's signatory and sole shareholder indicated that the Beneficiary worked in the office three days per week for a total of 22 or 23 hours, and would sometimes work after-hours or be on call. In his decision to revoke the approval of the petition, the Director acknowledged the Petitioner's explanation that the signatory had forgotten when responding to the inspecting officers that the Beneficiary worked at home, but noted that his Forms W-2 for 2018 and 2020 showed him earning less than the offered wage, suggesting that he was working part-time in those years. He also noted that some of the Beneficiary's duties listed in the labor certification involved direct contact with clients and therefore could not be performed at home. The Director ultimately concluded that this evidence showed that the Beneficiary's work schedule was inconsistent with a full-time position.

On appeal, the Petitioner repeats its assertion from its response to the Director's NOIR that the Beneficiary was and is currently employed full-time, attributing his reduced earnings in 2018 and 2020 to the date of the Beneficiary's attainment of employment authorization and a state-mandated temporary closure of its business due to the COVID-19 pandemic, respectively. More importantly, however, the Petitioner also cites to *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009) in arguing that the Beneficiary was not required to have been employed by the Petitioner prior to his adjustment of status to lawful permanent resident, and reiterates its intention to employ the Beneficiary per the terms of the labor certification at that time. It also notes that many of the duties of the offered position can be performed at home, and the position does not require the Beneficiary to be in the office at all times. Upon review, we agree that the Director erred in revoking the approval of the petition based upon his conclusion that the Beneficiary had not been employed by the Petitioner in a full-time position, and withdraw his decision.

B. Job Open to any U.S. Worker

In addition to revoking the approval of this petition on the ground discussed above, the Director also stated in his decision that the fact that the Beneficiary is a sibling of the Petitioner's sole shareholder

raised significant questions of "whether a bona fide position existed for U.S. workers."[1] However, in issuing a labor certification, DOL certifies that there are not sufficient U.S. workers available and that the employment of the alien will not adversely affect the wages and working conditions of workers in the United States similarly employed. 20 C.F.R. § 656.1 DOL has exclusive authority over the labor certification process, and barring evidence of fraud or a willful misrepresentation of material facts by a petitioner or beneficiary in the labor certification process, USCIS must accept the terms of the offered position as they are certified by DOL.[2] Here, in responding to Question 9 in Part C of the Form ETA 9089, the Petitioner indicated that it was a closely held corporation in which the Beneficiary either had an ownership interest or had a familial relationship with its owners or stockholders. Therefore, it did not misrepresent the familial relationship between the Petitioner's shareholder and the Beneficiary, and there was no basis for the Director to question DOL's certification that the offered position was available to U.S. workers. As such, to the extent that the Director based his decision on doubts concerning DOL's certification, we withdraw that decision.

C. Beneficiary's Qualification for the Offered Position

In Part H of the labor certification which accompanied the petition, the Petitioner indicated that the position of administrative secretary requires at least a high school diploma and 24 months of experience in the job offered, as well as fluency in the English and Tagalog languages. The Director noted in his decision that the Beneficiary appeared to be highly over-qualified for the position based upon his master's degree in business administration. As noted by the Petitioner on appeal, by itself the Beneficiary's possession of educational credentials far above the minimum required for the position does not affect his eligibility for the requested benefit.

However, while not addressed by the Director in his NOIR or decision to revoke the approval of the petition, on remand he should review the evidence to determine whether it establishes that the Beneficiary also possesses the required work experience for the offered position. Specifically, letters were submitted from two of the Beneficiary's previous employers, each of which confirms his job title and dates of employment with the company, and is accompanied by a document entitled "Job Details." However, despite being attached to letters from two different employers, these accompanying documents are identical in terms of font and format, and neither is referenced in the experience letters. As they therefore do not appear to have been prepared by those previous employers, this evidence does not meet the requirements at 8 C.F.R. § 204.5(g)(1) for such letters. We further note that neither letter indicates whether the Beneficiary worked full-time or part-time in these positions. Accordingly, on remand the Director should provide the Petitioner an opportunity to address these deficiencies in this evidence.

[1] The Director's NOIR did not include this ground as a basis for revocation of the petition, and therefore deprived the Petitioner of an opportunity to respond as required per 8 C.F.R. § 205.2(b).

[2] Section 204(b) of the Act, 8 U.S.C. § 1153(b), allows USCIS to approve a petition only after an investigation of the facts in each case to ensure that the facts stated in the petition (and any required labor certification) are true. 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)(1). USCIS will only approve an employment-based immigrant visa petition if it determines that the facts stated in the petition, which incorporates the labor 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).

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