U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15775564

Date: JUL. 13, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as an assistant Korean cook. It requests classification of the Beneficiary as an unskilled worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This immigrant visa category allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that it made a *bona fide* or realistic job offer to the Beneficiary, that it intended to hire a U.S. worker, or that the Beneficiary intends to engage in the offered position.

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 decision of the Director. The matter is remanded for the entry of a new decision consistent with the following analysis.

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. *BONA FIDE* JOB OPPORTUNITY

In this case, the accompanying labor certification was filed on August 8, 2019.[1] The Petitioner in this matter is a Korean restaurant, established in 2016, with 20 employees. The labor certification states that the offered position of assistant Korean cook requires a high school, or foreign equivalent, diploma and no experience or special skills. The labor certification states that the Beneficiary completed a general high school course in 1995 in South Korea, and was employed with the Petitioner as assistant manager from August 11, 2017 to July 13, 2018, before the labor certification was filed.

A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). In circumstances where the beneficiary may have influence and control over the job opportunity, the labor certification employer "must be able to demonstrate the existence of a bona fide job opportunity, *i.e.*, the job is available to all U.S. workers, …" *See* 20 C.F.R. § 656.17(l). Here, the Director issued a notice of intent to deny (NOID) the petition, noting the following information that cast doubt on the *bona fide* nature of the job offer:

- Although the labor certification states that the offered position does not require any experience, a statement from the Petitioner's owner describes the Beneficiary's experience cooking for family members, "suggest[ing] that the Petitioner is recruiting with conditions that were not contained on the labor certification … [and] suggesting that the Petitioner intended to hire only the Beneficiary for the position."
- The Beneficiary's lack of prior experience in food service and academic studies in an unrelated field cast doubt on her desire to now work in this field.
- The Petitioner's pre-existing employment relationship with the Beneficiary in a different position cast doubt on the nature of the offered position.
- The Petitioner indicated on the labor certification that the offered position was a new position and that it had operated for four years without the services of an assistant cook, which cast doubt on the realistic nature of the offered position and "the Petitioner's legitimate need to hire an assistant which would place a large financial burden on its earnings."
- The proffered annual wage of $23,000 cast doubt about the Beneficiary's intent to accept the offered position because the "salary is low compared with the amount of financial support the Beneficiary has and has received."

The Director determined that he intended to deny the petition because "[t]he Petitioner did not make a *bona fide* offer of employment which the Beneficiary intends to engage in, that was open to U.S. workers, or that the Petitioner would have hired a U.S. worker even if one had been identified in the labor certification process."[2]

[1] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

[2] The petitioner has the burden of establishing that a *bona fide* job opportunity exists when it is asked to show that the job

The Petitioner responded to the NOID with evidence of its recruitment for the offered position, including the determination of the prevailing wage, a job order placed with the state workforce agency, newspaper advertisements, an internal posting notice, and a recruitment report indicating that it received no applicants for the offered position. The Petitioner also provided a list of employees and its 2019 payroll and wage records, demonstrating that many of its cooks were only part-time and explaining its need for a full-time assistant cook. Additionally, the Petitioner provided copies of the Beneficiary's bank statements and two statements from the Beneficiary explaining how she became aware of the offered position and reiterating her intent to accept the job offer as an assistant Korean cook. In the Beneficiary's statements, she explains that she first accepted the position of assistant manager with the Petitioner in order to improve her English language skills, and that she later learned of the job opportunity of assistant cook from a church member, and from the Petitioner's owner while dining at his restaurant.

After receiving the Petitioner's response to the NOID the Director denied the petition. The Director noted various inconsistencies in the Petitioner's evidence, including a transfer of $10,000 from the Petitioner's manager, [redacted] to the Beneficiary's bank account in February 2020. He found that the Petitioner's response "did not address the hidden requirements of the position" as indicated in the Petitioner's owner's statement regarding the Beneficiary's family cooking experience, and did not address the Petitioner's "legitimate business reason to hire an assistant cook." The Director concluded that:

> [T]he totality of the record establishes:
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> - That the Petitioner does not appear to have a legitimate business need for an assistant Korean cook.
> - That the Petitioner held requirements for the position which were not listed on the labor certification and would have disqualified other U.S. workers.
> - That the Beneficiary does not intend to work for the Petitioner as an assistant Korean cook and is current[ly] attending seminary ...
> - Conflicting testimony about how the Beneficiary discovered the offered position.
> - Details of the Beneficiary's prior relationship and ... employment with the Petitioner that are not credible.
> - Facts demonstrating that the Beneficiary has a relationship with the Petitioner that would prejudice the Petitioner against hiring a U.S. worker.

On appeal the Petitioner asserts that the Director misapplied the law in concluding that the job offer was not *bona fide*. Specifically, the Petitioner states that despite its good faith recruitment efforts, it was not able to find any qualified U.S. workers for the proffered position, even when it tried to increase the pool of applicants by not requiring any prior experience. The Petitioner further states that its business decision to add the position of assistant cook is not relevant to the *bona fide* nature of the job opportunity, and the Beneficiary's unrelated fields of study are not relevant to her intent to accept the offered position upon approval of her permanent residence. The Petitioner addresses the

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is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361; 20 C.F.R. § 656.17(l).

inconsistencies, asserting that the Director erred in comparing the wages listed on its tax return to the wages on Form W-3, which include Social Security and other compensation; and that the Beneficiary's explanations of how she learned of the job opportunity are not in conflict, because both claims are true where she heard of the opportunity through both a church member and the Petitioner's owner. Finally, the Petitioner asserts that the Director erred in speculating that the Beneficiary's receipt of $10,000 from the Petitioner's manager, [redacted], gave her preferential treatment in the hiring process, when the money was actually received in repayment for a 2013 loan of $50,000 the Beneficiary gave to [redacted].

Here, the Director's decision implies that, because the Petitioner identified the Beneficiary as a candidate for the offered position before beginning the recruitment phase of the labor certification process, the job offer was not *bona fide*. The Director specifically points to the previous employment relationship between the Petitioner and the Beneficiary, as well as the Petitioner's acknowledgment of the Beneficiary's basic cooking skills when none are actually required for the position. However, because of the design of the labor certification process, every petitioner who files a labor certification has already identified a foreign national that they wish to hire prior to the required recruitment. The Petitioner's identification of the Beneficiary prior to the required recruitment, or even its employment of the Beneficiary prior to filing the labor certification does not indicate that the job is not open to U.S. workers. Rather, it indicates that the Petitioner followed DOL regulations in advertising for the job opportunity after identifying a foreign national for the position. *See, e.g.,* 20 C.F.R. § 656.17. Thus, the Director erred in denying the petition for lack of a *bona fide* job opportunity due to the Petitioner's identification of the Beneficiary as an applicant prior to the commencement of the labor certification recruitment process and this portion of the Director's decision is withdrawn.

The Petitioner has established its need for an assistant cook. This is supported by independent, objective evidence in the form of its payroll and tax records. Therefore, the Director also erred in concluding that the Petitioner did not have a legitimate business need for the offered position and we will withdraw this portion of the Director's decision.

The Director also erred in concluding that the Beneficiary's previous and current fields of study indicate that she will not work in the offered position. A petition represents an offer of future employment. A petitioner need not employ a beneficiary in an offered position until he or she obtains lawful permanent resident status. The Beneficiary's academic studies are insufficient evidence of her lack of intent to accept the offered position. Therefore, this portion of the Director's decision is also withdrawn.[3]

Although the Director erroneously considered certain factors relating to whether the job offer is *bona fide*, we cannot affirmatively conclude that the job opportunity here is, in fact, *bona fide*. Therefore, we will remand the matter to the Director for further consideration in accordance with the following discussion.

[3] 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.

Labor certification employers generally cannot "seek or receive payment of any kind for any activity related to obtaining permanent labor certification," including "reimbursement for costs incurred in preparing or filing a permanent labor certification application." 20 C.F.R. § 656.12(b). A payment to an employer "undermines the labor certification process by potentially corrupting the search for qualified U.S. workers and creating serious doubt as to whether the employer is offering a *bona fide* job opportunity and making it available for U.S. workers." DOL, Final Rule on Labor Certifications for the Permanent Employment of Aliens, 72 Fed. Reg. 27904, 27919 (May 17, 2007).

Here, the Petitioner attested on the labor certification that the company has not "received payment of any kind for the submission of this application." However, the record includes evidence that the Beneficiary made a payment of $50,000 to [redacted] a manager of the Petitioner, and that [redacted] made a payment of $10,000 to the Beneficiary in February 2020. With its appeal, the Petitioner submits a copy of a cashed check that the Beneficiary issued to [redacted] on November 15, 2013 in the amount of $49,982. In its brief on appeal, counsel for the Petitioner states that the Beneficiary lent [redacted] $50,000 and he later paid back a portion of the money he borrowed. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. There is nothing on the check to indicate the purpose of this payment and the record does not include any agreement between the Beneficiary and [redacted] regarding this loan, or even a statement from either party explaining this matter.

We also note that the Petitioner checked "no" to question C.9 on the labor certification, "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, corporate officers, incorporators, or partners, and the alien?" However, the Petitioner's list of 38 employees in 2019 identifies the Beneficiary's sister, [redacted], as a cook, and the Beneficiary's brother-in-law, [redacted] as a manager.[4]

Although the Petitioner attested that, as of the filing of the labor certification application, the Beneficiary had no family relationships to the company's owners, officers, or incorporators, the employment of the Beneficiary's brother-in-law as the Petitioner's manager raises a question whether this fact may have been misrepresented on the labor certification.[5] The record does not include the Petitioner's corporate documents listing its owners, officers, or incorporators, or indicate whether her brother-in-law was an owner, officer, or incorporator. Thus, on remand, the Petitioner must disclose any family relationships between the Beneficiary and the company's owners, officers, or incorporators as of the application's filing, and address the factors outlined in 20 C.F.R. § 656.17(l). Those factors include whether the Beneficiary: is in a position to control or influence hiring decisions for the offered position; has family relationships with the Petitioner's directors, officers, or employees; incorporated

[4] We note that other documents in the record suggest a lower number of employees: the Petitioner claimed 20 employees on the labor certification, and various quarterly wage statements show employee numbers ranging from 15 to 26 employees.

[5] We also note that the record includes 2019 IRS Forms W-2, Wage and Tax Statements for all employees. [redacted] Form W-2 reflects that he was the highest paid employee in 2019, earning more than the Petitioner's owner. However, the record does not include a description of [redacted] job duties as manager, including whether he was responsible for hiring and firing the Petitioner's employees.

or founded the company; has an ownership interest in it; participates in its management; serves on its board of directors; or is one of a small number of employees. *Id.*

A petition may be approved 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). 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 only required to approve an employment-based immigrant visa petition when 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).

III. THE BENEFICIARY'S QUALIFICATIONS

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the accompanying labor certification states that the offered position of assistant Korean cook requires a high school or foreign equivalent diploma. The labor certification states that the Beneficiary completed a general studies high school education in South Korea in 1995. However, the record does not include sufficient evidence demonstrating the Beneficiary's possession of a high school or foreign equivalent diploma. Although the record includes a "Certificate of Graduation," the document appears to be an English translation of the original certificate, as it is written in English only without an accompanying certificate in Korean.

Because we cannot affirmatively find that the Beneficiary possesses the education required for the offered position, we will remand the matter to the Director for further consideration. On remand, the Director may wish to issue a new NOID outlining the deficiencies above, requesting additional independent objective evidence in support, and allowing the Petitioner an opportunity to respond.

IV. CONCLUSION

Considering the above discussed deficiencies, we are withdrawing the Director's decision and remanding the petition to allow the Petitioner an opportunity to address the factors identified above. Further, the record does not contain evidence that the Beneficiary meets the minimum education required for the offered position. Therefore, we will remand this case to the Director for further consideration of the existence of a *bona fide* job offer and the Beneficiary's eligibility for the requested benefit.

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