U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22341469

Date: JUL. 28, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a nondurable goods wholesale trader, seeks to employ the Beneficiary as a purchasing agent. It requests classification of the Beneficiary as a skilled worker 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 category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Nebraska Service Center Director revoked the Form I-140, Immigrant Petition for Alien Workers, concluding that there was no bona fide job available at the time the labor certification was submitted and that recruitment for the position improperly occurred prior to the filing of the ETA Form 9089 (labor certification).

We review the questions in this matter de novo. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). The Petitioner bears the burden of proof 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). Upon de novo review, we will remand this case to the Director for further consideration of this issue, and any other issue the Director may deem relevant.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. See section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the 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. ANALYSIS

In this case, the accompanying labor certification was filed on May 25, 2017. The labor certification states that the offered position requires twenty-four months of experience as a purchasing agent. After reviewing the initial submission, the Director approved the petition. Subsequently, a consular officer at the U.S. Embassy in Seoul, South Korea interviewed the Beneficiary and obtained a sworn statement from him. The statement asserted that the Petitioner first offered the Beneficiary the purchasing agent job in 2013 and repeatedly offered him the job until he accepted it in 2015. The Director further determined that based on the Beneficiary's statement, this position was specifically created for the Beneficiary and the Petitioner's representative specifically recruited him from his current company. The Director then issued a notice of intent to revoke (NOIR) the petition, explaining that because the Beneficiary was specifically recruited and hired years prior to the Petitioner's advertising efforts and the filing of the labor certification, it appeared as though no position was available at the time the Petitioner filed the labor certification. Additionally, the Director noted that it appeared as though the position was specifically created for the Beneficiary and had never been available to U.S. workers.[1]

The Petitioner responded to the NOIR with a sworn declaration from the Petitioner's president denying that the position had first been offered to the Beneficiary in 2013, that it was repeatedly offered to him until 2015, and that the position was created for him. In addition, the Petitioner asserted that it would be lawful for a petitioner to offer a position prior to the recruitment process if a petitioner properly performed the recruitment process. Accordingly, the Petitioner surmised that the central issue was whether the Petitioner conducted its recruitment efforts properly. To support a finding of proper recruitment, the Petitioner submitted copies of the packet it provided in response to DOL's audit notice. The response packet included a recruitment report, samples of advertisements, and a declaration from the Petitioner that no U.S. workers submitted applications in response to the job opening. After reviewing the NOIR response, the Director revoked the petition, determining that the Petitioner's sworn declaration did not overcome the statements the Beneficiary made during his consular interview.

On appeal, the Petitioner argues that as the labor certification process requires a named individual, nothing in the law prohibits an employer from seeking out and offering employment to a specific person. The Petitioner further states that the process does not prohibit petitioners from creating new positions and that the Form I-140 specifically requests petitioners to indicate if a position is new. The Petitioner notes that nothing prevents a noncitizen from accepting a job offer conditioned upon the approval of DOL. To illustrate, the Petitioner offers the example that many I-140 petitions involve noncitizens who already work for a petitioner.

Upon review of the record, we hereby withdraw the Director's decision. 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. § 626.10(c)(8). While the labor certification process requires a test of the labor market, the DOL regulations do not require an employer to establish how it selected the foreign national for the job opportunity. Rather, the employer must show that there "are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment and

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

that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers." See https://www.dol.gov/agencies/eta/foreign-labor/programs/permanent. See also 20 C.F.R. § 656.1(a).

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 outside of the required recruitment, or even its employment of the Beneficiary in the offered job, does not indicate that the job is not open to U.S. workers. Rather, it may indicate 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 revoking the petition for lack of a bona fide job opportunity solely due to the Petitioner's identification of the Beneficiary as an applicant by recruitment methods outside of those conducted for the labor certification recruitment process. We therefore withdraw the Director's decision on the issue concerning a bona fide job opportunity and the Petitioner's recruitment efforts for the position.

III. CONCLUSION

The Director may issue a request for any evidence that may be deemed relevant to this issue or any other issue. After the Petitioner's response is received, or the response period expires, the Director may issue a new decision.

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