U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18407292

Date: MAY 27, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, a convenience store, seeks to employ the Beneficiary as an assistant manager. It requests classification of the Beneficiary as a professional under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(B)(3)(A)(ii). This employment-based "EB-3" 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 on the ground that the Petitioner did not show that it made a *bona fide* job offer to the Beneficiary, or that it intends to employ the Beneficiary in the offered position.

On appeal the Petitioner asserts that the Director's decision was erroneous in fact and law. The Petitioner contends that the evidence of record demonstrates that its business is in need of an assistant manager, that the Beneficiary has the qualifications for the job, that no qualified U.S. workers applied for the position, and that there was no legal basis for the Director to conclude that the Petitioner did not make a *bona fide* offer to the Beneficiary and did not intend to employ the Beneficiary in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The burden is on the petitioner in visa petition proceedings to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of the evidence that the beneficiary is fully qualified for the benefit sought. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (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 will withdraw the Director's decision. We will remand the case for further consideration and the entry of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) 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 (Form I-140) 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

The instant I-140 petition was filed on January 25, 2019, accompanied by a labor certification that was filed with the DOL on August 24, 2018, and certified in November 2018. The labor certification stated that the minimum educational and experience requirements for the job of assistant manager were a bachelor's degree in business administration, or a foreign educational equivalent, and two years of experience in the job offered. After issuing a notice of intent to deny (NOID) and receiving the Petitioner's response thereto, the Director denied the petition on March 21, 2019, stating that the Petitioner did not explain why a bachelor's degree was needed for the position nor submit documentation of its recruitment process, and therefore failed to establish that the proffered position was a *bona fide* job offer open to U.S. workers or that it intended to employ the Beneficiary in the position.

On appeal, however, the AAO withdrew the Director's decision. In our decision dated September 20, 2019, we pointed out that the Petitioner's vice president had submitted a letter describing why a baccalaureate degree was required for the assistant manager position, and that the Director had no authority to challenge the bachelor's degree requirement in the certified ETA 9089 anyway unless there was a finding of fraud or misrepresentation of a material fact involving the job requirements that warranted the invalidation of the labor certification. Since there was no invalidation of the labor certification, we stated that the Director was bound by its job requirements and erred in questioning the bachelor's degree requirement for the proffered position. We concluded that the record did not support the Director's denial of the petition based on the *bona fides* of the job offer, and withdrew the Director's decision. However, we did not approve the petition because the evidence of record did not establish the Petitioner's ability to pay the proffered wage from the priority date of August 24, 2018,[1] onward. Since the Director had not previously addressed this issue, we remanded the case for the Director to request additional evidence of the Petitioner's ability to pay the proffered wage. We also stated that the Director could notify the Petitioner of other potential grounds for denial, and if one such

[1] The priority date of an employment-based immigrant petition is the date the underlying labor certification application was filed with the DOL. 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied by the priority date.

ground was fraud or willful misrepresentation of a material fact on the labor certification the Petitioner must be given notice of the specific allegation.

The Director issued a request for evidence (RFE) on October 22, 2019, requesting the submission of documentation to establish the Petitioner's ability to pay the proffered wage of $26.50 per hour, as stated in the labor certification (or $55,120 per year based on a 40-hour work week), from the priority date of August 24, 2018, onward. If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS examines the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. In response to the RFE the Petitioner submitted a copy of its federal income tax return, Form 1120S, U.S. Income Tax Return for an S Corporation, for 2018 which recorded net income of $105,306[2] and net current assets of $93,145[3] that year. Both of these figures exceeded the proffered wage.

The Director then issued a NOID on February 13, 2020, once again stating that the evidence of record did not show that the Petitioner made a *bona fide* job offer to the Beneficiary or that the Petitioner intends to employ the Beneficiary in the offered position, or that the Beneficiary intends to work in the offered position. To augment the record the Director indicated that the Petitioner should submit copies of its recruitment reports; the 2018 Form W-2, Wage and Tax Statements, for each of its employees; the Petitioner's Form 941, Employer's Quarterly Federal Tax Return, for all quarters in 2018 and 2019, including the supplements identifying all employees; the Petitioner's payroll records in 2018; and a list of all employees in 2018 with information about their positions, salaries, hiring dates, and work hours per week.

In response to the NOID the Petitioner submitted a brief from counsel, a letter from its vice-president, a copy of a previously submitted letter from its vice president; a copy of its recruitment report, including job advertisements for the proffered position; another copy of the Petitioner's 2018 federal income tax return; and the DOL's final rule on the processing of labor certification applications, effective July 16, 2007.

The Director denied the petitioner for the second time on December 15, 2020. In the decision the Director noted that the Petitioner did not provide any of the payroll, tax, and employee documentation listed in the NOID, and stated that some of the Petitioner's employees also appeared to be owners. With regard to the new letter submitted by the Petitioner's vice president, the Director stated that it provided "limited information" about the Petitioner's business operations and attributed the fluctuating

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[2] If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation").

[3] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on Schedule L, lines 1-6, of the Form 1120S, and its current liabilities, entered on Schedule L, lines 16-18.

employee totals (the labor certification application in August 2018 indicated eight, while the petition in January 2019 indicated six) to the business's high turnover rate. Referring to the recruitment report, the Director noted that the job advertisements produced no applicants during the recruitment period in April and May 2018. The Director pointed out that the job advertisement with the State Workforce Agency (SWA) contained a line entry for "special skills" which stated that the job requires a "Bachelor's Degree or higher (or foreign equivalent) in Business Administration and 2 years experience in the job duties," and that this language was not included in Box H.14 (Special skills and other requirements) of the labor certification. The duties of the proffered position as described on the labor certification (Box H.11) include the scheduling of staff, sales, inventory control, customer service, pricing, budget, and light bookkeeping, liaising with vendors, and ensuring that safety, health, and security rules are met. The employment verification letters that were submitted with the petition, the Director noted, do not mention any experience by the Beneficiary with safety, health, and security rules. In view of this inconsistency between the Beneficiary's employment verification letters and the job duties of the proffered position as described in Box H.11 of the labor certification, the Director determined that "the petitioner intends to hire the beneficiary contrary to the fact that he does not appear to have the requisite experience or skills for the position."

The Director concluded that "[b]ased on the totality of the record . . . the evidence does not show that the petitioner made a bona fide job offer to the beneficiary, or that the petitioner desires and intends to employ the beneficiary in the offered position."

On appeal the Petitioner asserts that, contrary to the Director's decision, the business need for an assistant manager was well described in the statements from the Petitioner's vice president and the recruitment efforts during the labor certification process; that no able, willing, and qualified U.S. workers applied for the job; that the Beneficiary has the requisite qualifications for the job; and that the Petitioner has the ability to pay the proffered wage. The Petitioner asserts that the Director "applie[d] a nebulous and undefined meaning of "bona fide job offer" that does not exist in the Act or its implementing regulations.

As in our previous remand decision following the Petitioner's initial appeal, we conclude that the record does not support the Director's denial of the petition based on the *bona fides* of the job offer to the Beneficiary. However, the Director did raise an additional issue concerning the inconsistency between the duties of the proffered position as described in Box H.11 of the labor certification and the duties the Beneficiary performed in previous jobs according to the employment verifications letters in the record, which called into question whether the Beneficiary had the requisite experience for the proffered position in accordance with the labor certification. Since this issue was not addressed by the Director in the RFE or the NOID, it was not a proper basis for the Director to deny the petition. Instead, the Director should have issued a supplemental RFE or NOID providing the Petitioner the opportunity to respond and submit additional evidence.

We also note that the Director previously requested other documentation – including payroll, tax, and employee documentation – which was not submitted by the Petitioner. If relevant to the question of the Petitioner's continuing ability to pay the proffered from the priority date of August 24, 2018, onward, the Director may consider whether such documentation is necessary, or request additional required documentation related to the Petitioner's continuing ability to pay the proffered wage after

the priority date year of 2018. The regulation at 8 C.F.R. § 103.2(b)(14) provides that the failure to provide requested evidence that precludes a material line of inquiry may be grounds for denying the benefit request.

Accordingly, we will remand this case to the Director for further consideration. The Director may issue an RFE or a NOID advising the Petitioner of any apparent inconsistencies between the job requirements on the labor certification and the Beneficiary's qualifying experience, and provide the Petitioner the opportunity to reply and submit rebuttal evidence. The Director may also request any other evidence that may be deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit.

As previously stated, it is the Beneficiary's burden in these proceedings to establish eligibility for the requested benefit by a preponderance of the evidence. *See* Section 291 of the Act; *Matter of Chawathe*.

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.