U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19821739

Date: SEP. 02, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a zinc electro plating business, seeks to employ the Beneficiary as a factory worker. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(B)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent residence a beneficiary who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center initially approved the petition but subsequently revoked that approval on notice. The Director concluded that: (1) the Petitioner and the Beneficiary both made payments to the representative who prepared the labor certification and Form I-140; and (2) due to violations of 20 C.F.R. § 656.12, the offered position was not a *bona fide* job offer that was clearly open to other U.S. workers.

On appeal, the Petitioner asserts that it directly paid all required costs for the labor certification process and did not violate the regulation at 20 C.F.R. § 656.12(b) relating to "Improper Commerce and Payment" during the labor certification process.

We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). In this proceeding, 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 withdraw the Director's decision and remand this case to the Director for further consideration and 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 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.

At any time before a beneficiary obtains lawful permanent resident status, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner does not submit a NOIR response or the response does not overcome the stated revocation grounds, USCIS properly revokes the petition's approval. *Id.* at 452.

II. ANALYSIS

At issue in this case is whether the Director properly revoked the approval of the petition. For the reasons discussed below, we will withdraw the Director's decision and remand the matter for further consideration and entry of a new decision.

A. *Bona Fide* Job Offer

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). This attestation "infuses the recruitment process with the requirement of a bona fide job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*); *see* 20 C.F.R. § 656.17(l). 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).

The regulation at 20 C.F.R. § 656.12(b) states:

> An employer must not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application, except when work to be performed by the alien in connection with the job opportunity would benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. An alien may pay his or her own costs in connection with a labor certification,

> including attorneys' fees for representation of the alien, except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer.

Here, the Petitioner marked "No" on the labor certification at Section I, Part E.23, which states "Has the employer received payment of any kind for the submission of this application?"

As noted, the Director initially approved the petition in April 2017. In April 2021, the Director issued a NOIR and advised the Petitioner that "the Department of State returned Form I-140 to USCIS because it appeared that the beneficiary was not eligible for the requested benefit."

In stating the proposed grounds for revocation, the Director indicated that "in accordance with 20 C.F.R. section 656.12(b), the petitioner did not bear the total cost of preparation and filing of this accompanying labor [certification] and petition." The Director did not further address the source of this derogatory information. A NOIR "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. at 451. Here, the NOIR did not include the required specific statement of the facts and evidence supporting the proposed revocation.

The Director further indicated his intent to revoke the approval of the petition based on a determination that the Petitioner did not make a *bona fide* job offer. In this regard, the NOIR states:

> It is unclear how the petitioner could employ the beneficiary in the offered position because the Attorney-of-Record failed to disclose that it had received payment from the beneficiary in violation of 20 CFR Section 656.12(b). This shows that the beneficiary had undue influence and benefit over others who may have applied for this position. . . . Therefore, 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 intended position.

The Director instructed the Petitioner to "submit evidence to show that the petitioner paid all fees associated with this filing and the labor [certification] preparation to include attorney cost." The Petitioner submitted a timely response.

In the revocation decision, the Director listed the evidence the Petitioner provided in response to the NOIR, which included affidavits from the Petitioner, the Beneficiary, and an attorney, and evidence related to payments ostensibly made by the Petitioner in connection with the labor certification, and by the Beneficiary in connection with the Form I-140 and his immigrant visa application. The Director did not further address this evidence. Therefore, it is unclear whether the Director weighed all evidence submitted in response to the NOIR before issuing the revocation decision.

The Director ultimately determined that, because the Petitioner and Beneficiary had the same representative, the Beneficiary was prohibited from paying any costs associated with either the labor certification *or* the Form I-140, a determination that is not supported by 20 C.F.R. § 656.12(b). The Director therefore revoked the approval based on a conclusion that the position was not clearly open to other U.S. workers and there was no *bona fide* job offer.

We will remand the case to the Director for full consideration of the Petitioner's response to the NOIR so that he can weigh whether such evidence was sufficient to establish that the Beneficiary did not make any prohibited payments related to the labor certification. The regulation at 20 C.F.R. § 656.12(b) does not prohibit the beneficiary of a petition from paying costs associated with the Form I-140. The Director should also review the Petitioner's appellate brief and evidence submitted in support of the appeal. If, after considering the evidence in its totality, the Director determines that the Petitioner did not establish the *bona fides* of the job offer or the Petitioner's compliance with 20 C.F.R. § 656.12(b), he may address these issues in a new NOIR, ensuring that it includes the required specific statement of the facts and evidence supporting the proposed revocation.

B. Ability to Pay

Although not addressed by the Director in the NOIR or notice of revocation, the record does not establish the Petitioner's continuing ability to pay the Beneficiary's proffered wage as of the priority date.

A petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. *Id.* In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by USCIS. *Id.*

In this case, the priority date is April 18, 2016. At the time of filing the petition in January 2017, the Petitioner indicated that it was submitting copies of its "audited financial statement" for the years 2014 and 2015 as evidence of its ability to pay the proffered wage. However, the only financial evidence provided was a document titled "combined financial statements with accountant's compilation report" for the Petitioner and a related entity for the years ended March 31, 2014 and March 31, 2015. The evidence did not include the referenced compilation report from an accountant.[1]

The record does not include the Petitioner's federal tax return, annual report, or audited financial statement for any year. Nor did the Petitioner establish that it employs 100 or more workers and provide a statement from its financial officer attesting to its ability to pay. Thus, the Petitioner did not submit the required evidence under 8 C.F.R. § 204.5(g)(2) to establish its ability to pay the proffered wage from the priority date of April 18, 2016 onward. The initial approval of the petition without this evidence constituted error on the part of the Director.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's response to the previously issued NOIR and for entry of a new decision. In addition,

[1] Even if the Petitioner had provided the compilation report, the evidence would be insufficient to satisfy the evidence requirement at 8 C.F.R. § 204.5(g)(2), as a compiled financial statement is not equivalent to an audited financial statement. In contrast to compiled financial statements, audits are conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the organization are free of material misstatements. Compiled financial statements provide no such assurance.

we remand this matter 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) to establish its continuing ability to pay the proffered wage from 2016. The Director may also request any other evidence that may be deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit.

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