U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22679425

Date: FEB. 23, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, an automated semiconductor device and systems monitoring business, seeks to employ the Beneficiary as a director of engineering. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant classification. Immigration and Nationality Act (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 a foreign national for lawful permanent resident status to work in a position 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 denied the petition, concluding that Petitioner did not reveal on the labor certification that the Beneficiary is its corporate officer, and the Petitioner failed to provide sufficient evidence that a bona fide job opportunity existed for U.S. workers. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *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 the matter for entry of a new decision consistent with the following analysis.

I. LAW

Employment-based immigration generally follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are available for the offered position. 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. Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant

classification, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5.[1] Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

The Director denied the petition finding the Petitioner did not establish a bona fide job opportunity open to U.S. workers. The Director pointed to inconsistencies in the record which call into question the bona fides of the job opportunity. Specifically, the Petitioner's CEO/President's statements and its tax returns indicate the Beneficiary is an officer of the Petitioner, while the Petitioner did not disclose this relationship in the labor certification.

The Petitioner's assertions on appeal are persuasive. 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 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-INA-228, 1991 WL 223955, at 7 (BALCA 1991) (en banc); see also 20 C.F.R. § 656.17(1).

To assess whether a bona fide job offer may be at issue, section C.9 of the labor certification asks, "Is the employer a closely held corporation . . . in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The Petitioner checked "No" in response to this question, attesting that the Beneficiary has no ownership interest in the company and there is no familial relationship between the Beneficiary and its owners, stockholders, partners, corporate officers, or incorporators.

The Director acknowledged that the record demonstrates the Beneficiary does not have an ownership interest in the Petitioner. However, the Director found that the Petitioner's submitted tax documents indicate the Beneficiary held an officer position and this relationship should have disclosed at section C.9 of the labor certification. The question at C.9 specifically relates to ownership interests and familial relations, and thus the Beneficiary's role as an officer of the Petitioner appears to be beyond the scope of the question. Therefore, the Petitioner answering "No" to question C.9 is correct based on the record. Moreover, we note the Petitioner disclosed on the labor certification that it has one employee, the Beneficiary, detailing the Beneficiary's current position and job duties, which appears to have provided the DOL sufficient evidence to audit the recruitment process prior to certifying the labor certification.

For these reasons, we will withdraw the Director's finding on this issue.

[1] These requirements must be satisfied by the priority date of the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2), Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d). In this case, the priority date is September 10, 2018.

The Director also found that a bona fide job offer does not exist since the Petitioner has one employee, the Beneficiary, and it is unclear how the Beneficiary was recruited to the position when the Petitioner's CEO/President supervises from abroad. The Director acknowledged the record shows the Beneficiary does not have an ownership interest in the Petitioner, however, found the Petitioner did not address "whether the [B]eneficiary exercised influence and control over the job opportunity." The Director stated the Petitioner failed to submit copies of its recruitment documents "or any other evidence to show that the job was truly available to U.S. workers."

The Petitioner disputes the Director's reliance on, and the relevance of, the Petitioner's recruitment efforts by a CEO/President who supervises from abroad. The Petitioner contends that the way the Beneficiary was recruited is irrelevant to determining whether a bona fide job opportunity exists, and, if it is relevant, the Director did not specifically request evidence of whether the Beneficiary exercised influence and control over the job opportunity, or the recruitment information. Instead, the request for evidence (RFE) notice requested evidence of whether the Petitioner made a bona fide job offer to the Beneficiary, with a list of suggested documents including the recruitment documents. With the RFE reply, the Petitioner submitted another suggested document, a statement from its CEO/President explaining his and the Beneficiary's roles with the Petitioner, and that he is solely responsible for hiring and supervising the Petitioner's employees. The Petitioner argues this statement demonstrates the Beneficiary did not exercise influence and control over the job opportunity, as indicated by the Director. In support of the appeal, the Petitioner submits documentation related to its recruitment efforts.

We withdraw the Director's finding on the bona fides of the job offer and remand for the Director's consideration of the submitted recruitment materials with the evidence in the record. On remand, the Director may wish to issue a new RFE and allow the Petitioner an opportunity to respond.

Also, a petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). In this case, the proffered wage is $88,795 per year and the priority date is September 10, 2018. The Petitioner submitted the Beneficiary's IRS Forms W-2, Wage and Tax Statements, for 2018 and 2019 as evidence of its ability to pay the proffered wage. The statements indicate the Petitioner paid the Beneficiary a wage of $90,000 for both years, which is more than the proffered wage. Therefore, the Petitioner has established its ability to pay the proffered wage for the years 2018 and 2019. However, the record does not contain evidence of the Petitioner's ability to pay the proffered wage for 2020 onward.

Therefore, we will also remand this case 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) for the Petitioner's ability to pay the proffered wage for 2020 and any subsequent year(s) in the Director's discretion. The Director may also request any other evidence that may be deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit.

III. CONCLUSION

For the reasons discussed above, we are withdrawing the Director's decision. We will remand this case for further consideration of whether the Petitioner meets all eligibility requirements 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.