U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24546691

Date: JAN. 31, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a plastic products wholesaler, seeks to employ the Beneficiary as a sales representative for plastic manufacturing machinery. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that a bona fide job offer existed or that the job opportunity was open to 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.

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.

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). Factors considered include whether a 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 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.*

The Director determined that a familial relationship existed between the Petitioner and the Beneficiary.[1] In a notice of intent to deny (NOID) the petition, the Director informed the Petitioner that this relationship, which was not disclosed to DOL or USCIS, cast doubt on the bona fides of the job opportunity and whether the job opportunity was truly open to U.S. workers.

In its response to the NOID, the Petitioner provided all evidence requested to establish that it had made a bona fide job offer, including evidence of its recruitment efforts and its response to a DOL audit notification. The Petitioner also provided a statement from its general manager, who does not appear to have a familial relationship with the Beneficiary, asserting that he has the sole ownership interest in the Petitioner.

After receiving the Petitioner's response to the NOID, the Director denied the petition. The Director stated that the Petitioner's recruitment evidence alone does not establish a bona fide job offer. Although the Director identifies the Petitioner's additional evidence submitted in response to the NOID, including its articles of incorporation, share certificates, and a list of officers and shareholders, the Director does not discuss this evidence in detail or explain why it was insufficient to demonstrate a bona fide job opportunity.

On appeal the Petitioner reiterates that no familial relationship exists between the Petitioner's shareholders or officers and the Beneficiary. It further states that, despite its good faith recruitment efforts, it was not able to find any qualified U.S. workers for the proffered position.

We conclude that the Petitioner has established by a preponderance of the evidence, including evidence submitted in response to the NOID and on appeal, that a bona fide job offer exists. We will therefore withdraw the Director's decision. However, we cannot determine that the petition is approvable based on the current record.

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). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

[1] The Beneficiary's spouse is the sister-in-law of the brother of the Petitioner's president and general manager. It should be noted that the brother of the Petitioner's president is not employed by and does not hold any position with the Petitioner.

The record contains the Petitioner's federal tax return for 2018 but does not contain any of the regulatory-prescribed evidence of its ability to pay the proffered wage of $35,090 per year for the years 2019 and onward. Without this evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

Therefore, we will remand this matter. On remand, the Director should analyze the record and determine whether the Petitioner has established its ability to pay the proffered wage from the priority date onward. The Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

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