U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27444031

Date: JUL. 18, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Professional)

The Petitioner provides tax and accounting services and seeks to permanently employ the Beneficiary as an accountant. The business requests his classification under the employment-based, third-preference ("EB-3") immigrant visa category as a professional. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). Prospective U.S. employers may sponsor noncitizens for lawful permanent residence in this category to work in jobs requiring at least a bachelor's degree. *Id.*

After the filing's initial grant, the Acting Director of the Texas Service Center revoked the petition's approval. The Director concluded that the Petitioner did not demonstrate its intent to employ the Beneficiary in the offered position or the job's availability to U.S. workers. On appeal, the business contends that the Director based the findings on irrelevant facts and lacked authorization to consider the bona fides of the job opportunity.

In these revocation proceedings, the Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (citation omitted). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the record does not support the Director's revocation. But, because the Petitioner did not demonstrate its required ability to pay the job's proffered wage at the time of the petition's approval, we will remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as a professional generally follows a three-step process. First, a prospective employer must obtain U.S. Department of Labor (DOL) certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and permanent employment of a noncitizen in the job would not harm wages and working conditions of U.S. workers with similar positions. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C.

§ 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(A), (C).

Finally, if USCIS approves a petition, a beneficiary 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.

"[A]t any time" before a beneficiary obtains lawful permanent residence, 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 a record, a petition's erroneous approval may justify 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 respond to a NOIR or the business's reply does not rebut the stated revocation grounds, USCIS properly revokes a petition's approval. *Id.* at 452.

II. ANALYSIS

A. The Petitioner's Intent to Employ the Beneficiary in the Offered Position

A business may file an immigrant visa petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions stated on an accompanying labor certification. *Matter of Izdesbka*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of an accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis).

On the Form I-140, Petition for Alien Workers, and the accompanying labor certification, the Petitioner attested to its intent to permanently employ the Beneficiary in the full-time position of accountant at an office in [redacted] Texas. But, as stated in the Director's August 2022 NOIR, the Beneficiary attested at his adjustment of status interview in March 2021 that he would work in the offered position for the Petitioner at a different [redacted] address than listed on the Form I-140 and labor certification. He also stated that this location would be his only worksite.

The Petitioner's NOIR response contained an affidavit from the Beneficiary stating that he "misunderstood the [USCIS officer's] question [about his future worksite] and answered it incorrectly." He said he realized his mistake during the interview and tried to notify the officer of the correct worksite address at that time, "but the officer had said that my answer was fine."

The Beneficiary explained that the Petitioner had two offices in [redacted] its main office on [redacted] and an office on another street called [redacted] Before the petition's approval in December 2019, the Petitioner provided a copy of its sublease for the [redacted] office, valid from February 2017 through January 2020. The Beneficiary stated that he would work in the offered position at the [redacted] office, the same location where the business employed him as an

accounting clerk from April 2017 to January 2018. He said the Petitioner used the [redacted] office - the purported mistaken address he first provided to the USCIS officer - only for client meetings. In an August 2022 letter, the Petitioner's president stated that the [redacted] office served "as a secondary location but is permanently closed now."

Because the Beneficiary testified that he would work at a different address than listed on the Form I-140 and labor certification, the Director concluded that the business did not demonstrate its intent to employ the Beneficiary in the offered position. The Director's decision states: "It is unclear how the petitioner could employ the beneficiary in the offered position because it appears that the petitioner intended to employ the beneficiary outside of the worksite location listed on the [labor certification]."

USCIS may deny or revoke a petition's approval if a petitioner intends to employ a beneficiary in a geographical area not stated on an accompanying labor certification. *See Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial where a petitioner intended to employ a beneficiary in a different state than listed on the accompanying labor certification). But, even if the Petitioner intended to employ the Beneficiary at the [redacted] office, the new worksite would not have warranted the petition's denial. A labor certification is valid for the particular job opportunity, the noncitizen, and the "area of intended employment" stated on the certification. 20 C.F.R. § 656.30(c)(2). The term "area of intended employment" means the area within normal commuting distance of the place of intended employment, and any place within a metropolitan statistical area (MSA) "is deemed to be within normal commuting distance of the place of intended employment." 20 C.F.R. § 656.3. The Petitioner's [redacted] offices are within the same MSA, "[redacted] TX," as both offices lie in the city of [redacted] *See* The Foreign Labor Certification Data Center, "Wage Search Wizard," www.flcdatacenter.com/oeswizardstart.aspx.[1] Thus, regardless of at which [redacted] office the Petitioner intended to employ the Beneficiary, the labor certification would remain valid. Also, the NOIR does not allege, and the record does not indicate, that the offered position's duties or requirements would change or that the business would offer the job to another noncitizen. Therefore, even if the Petitioner intended to employ the Beneficiary at the [redacted] office, the worksite change would not have warranted the petition's denial.[2]

Moreover, the record does not support the Petitioner's intent to employ the Beneficiary at the [redacted] office. The Beneficiary claims that he mistakenly identified that address as his future worksite and that, when he tried to provide the correct [redacted] address, the USCIS officer indicated that the mistake did not matter. Also, the Beneficiary's error, at most, indicates *his* intent to work at the [redacted] office. But the record lacks evidence that the *Petitioner* intended to employ him there. Thus, for the foregoing reasons, the record does not sufficiently support revocation of the petition's approval based on the Petitioner's alleged intent to employ the Beneficiary at a different worksite. We will therefore withdraw the Director's contrary finding.

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[1] Under contract with DOL's Office of Foreign Labor Certification, the State of Utah developed and maintains the data center website. *Id.*

[2] A worksite change during labor certification application proceedings also does not necessarily merit an application's denial. *See Matter of Rivet Logic Corp.*, 2012-PER-01827, slip op. at 4 (BALCA Sept. 9, 2016) (reversing certification denial where, during supervised recruitment, an employer posted notice of the application's filing at a new worksite not listed on the original application but in the same MSA as the originally listed worksite).

B. The Offered Position's Availability to U.S. Workers

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). The Director concluded that the Petitioner did not demonstrate the offered position's availability to U.S. workers. The NOIR cites evidence suggesting that, compared to the five U.S. workers who applied for the job, the Beneficiary received preferential treatment. The NOIR notes that:

- Although the Beneficiary told USCIS officers that the Petitioner's president verbally offered him the accountant's position in January 2018, the labor certification - filed in March 2019 - does not list this "word-of-mouth recruitment" for the position;
- The Beneficiary stated that, although the Petitioner's president interviewed him for his prior accounting clerk position, the president did not specifically interview him before offering him the accountant's position; and
- The Petitioner's labor certification recruitment efforts did not begin until November 2018, about 10 months after the business offered the Beneficiary the accountant's job.

As the Petitioner contends, however, USCIS lacks authority to consider the offered position's availability to U.S. workers. As previously indicated, Congress authorized DOL to determine whether "there are not sufficient [U.S.] workers who are able, willing, qualified . . . and available" for an offered position. Section 212(a)(5)(A)(i)(I) of the Act. "[D]eterminations vested by statute with one agency are not normally subject to horizontal review by a sister entity, absent congressional authorization to that effect." *Madany v. Smith*, 696 F.2d. 1008, 1012 (D.C. Cir. 1983). Thus, the Director should not have considered the offered position's availability to U.S. workers.

Also, even if USCIS could consider the bona fides of the job opportunity, the NOIR cites facts that do not support the alleged inadequacies in the Petitioner's recruitment efforts. The Director found the Petitioner's verbal job offer to the Beneficiary to constitute word-of-mouth recruitment that the business should have listed on the labor certification application. But the Director appears to mistakenly refer to a section of the application form that does not apply to the Petitioner's job offer. Section I.b.5. of the application instructs an employer to "Specify additional recruitment information in this space." But section I.b. applies only to "Special Recruitment and Documentation Procedures for College and University Teachers." *See* 20 C.F.R. § 656.18. The Petitioner did not offer the Beneficiary a job as a college or university teacher, but rather as a professional. Thus, the business needed to complete information about the recruitment steps listed in sections I.c and I.d. of the application.

The NOIR also suggests the Director's misunderstanding of the labor certification process. The process focuses not on the recruitment of noncitizens for offered positions, but rather on recruitment of potentially qualified U.S. workers. *See* 20 C.F.R. § 656.17(e) (listing labor certification recruitment requirements). DOL requires U.S. labor market tests to determine whether "there are not sufficient workers who are able, willing, qualified … and available" for offered jobs. Thus, when and how the Petitioner offered the Beneficiary the position and whether the business interviewed him would not in this case demonstrate inadequacies in the business's recruitment efforts or the job's unavailability to U.S. workers.

For the foregoing reasons, the record does not support revocation of the petition's approval based on the job's availability to U.S. workers. We will therefore withdraw the revocation decision.

C. Ability to Pay the Proffered Wage

The appeal overcomes the revocation grounds. But, at the time of the petition's approval, the Petitioner did not establish eligibility for the benefit request. Although unaddressed by the Director, the record did not demonstrate the business's required ability to pay the offered position's proffered wage.

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Unless a petitioner employs at least 100 workers, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

When determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of a petition's priority date. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to cover any differences between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

The Petitioner's labor certification states the proffered wage of the offered position of accountant as $45,968 a year. The petition's priority date is March 31, 2019, the date DOL accepted the business's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

USCIS approved the petition on December 20, 2019. Thus, at that time, the Petitioner had to demonstrate its ability to pay the proffered wage in 2019, the year of the petition's priority date.

The record lacks evidence that the Petitioner paid the Beneficiary in 2019. Thus, based solely on wages paid, the business did not demonstrate its ability to pay the proffered wage.

The Petitioner submitted copies of a 2019 balance sheet and income statement as of September 30. The income statement reflects net income of $120,857.85, exceeding the annual proffered wage of $49,968. But, contrary to 8 C.F.R. § 204.5(g)(2), the Petitioner did not demonstrate that the income statement was "audited." The statement therefore does not demonstrate the business's ability to pay the proffered wage in 2019.

The Petitioner also submitted copies of its quarterly state unemployment tax returns for the first three quarters of 2019 and bank statements from March 2019 to September 2019. The state tax returns, however, do not indicate the business's annual net income or net current assets. The tax returns therefore do not demonstrate the Petitioner's ability to pay the proffered wage. Also, the bank account statements indicate that the Petitioner ended September 2019 with a balance of $25,104.25, less than the annual proffered wage. The Petitioner also submitted copies of a November 2019 statement for a

different bank account. But the November 2019 statement shows an end balance of $19,303.25, also less than the annual proffered wage. Thus, the Petitioner's bank statements do not establish the business's ability to pay the proffered wage in 2019.

The Petitioner's prior counsel asserted the willingness of the business's president to reduce his share of the corporation's profits to pay the Beneficiary's proffered wage in 2019. The Petitioner submitted a copy of its president's joint federal income tax return for 2018, indicating adjusted gross income of $248,603.

USCIS may allow a shareholder with authority to allocate a closely held corporation's expenses to forego variable compensation and apply it to a proffered wage. But former counsel's assertion of the willingness of the Petitioner's president to forego his share of the business's profits in 2019 does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The business must substantiate former counsel's assertion with independent evidence, such as affidavits or declarations, and submit evidence of its president's income in 2019.

Also, the copy of the 2018 tax return indicates that the Petitioner's president and his spouse reside in a "community property" state. Thus, the couple generally co-own property they acquire during their marriage. *See, e.g.*, Tex. St. Law Library, "Community Property," https://guides.sll.texas.gov/community-property. The Petitioner therefore must submit evidence that its president's spouse also would have foregone his 2019 business profits to pay the Beneficiary's proffered wage.

Further, the Petitioner's president and his spouse must demonstrate that, after subtracting the portion of his 2019 profits used to pay the Beneficiary's proffered wage, the couple would have had sufficient income to support themselves and any dependents that year. Their 2018 tax return shows that the couple had two dependent children. The Petitioner must therefore submit an estimate of the family's 2019 expenses so that USCIS may determine the couple's ability to pay the Beneficiary's proffered wage that year.

The Director did not inform the Petitioner of the evidentiary deficiencies regarding its ability to pay the proffered wage. We will therefore remand the matter.

On remand, the Director should issue a new NOIR, notifying the business of the evidentiary deficiencies and affording it a reasonable opportunity to respond. The Director should ask the Petitioner to submit copies of an annual report, federal tax return, or audited financial statements for 2019. The business must also submit evidence of the purported willingness of its president and his spouse to forego his 2019 business profits, proof of his 2019 income, and an estimate of their family expenses that year. The Petitioner may submit any additional evidence of its ability to pay in 2019, including proof that it paid the Beneficiary wages or materials supporting the factors stated in *Sonegawa*. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

If supported by the record, the new NOIR may include any additional, potential revocation grounds. The Director, however, must provide the business with a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

The record does not support the Director's revocation of the petition's approval. But, at the time of the grant, the Petitioner had not demonstrated its ability to pay the offered position's proffered wage.

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