U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26963659

Date: JUL. 20, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a restaurant company, seeks to employ the Beneficiary as a chef. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner's job offer was bona fide, that the Beneficiary had the work experience required for the offered position, or that the Beneficiary was eligible for the requested classification. 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. To permanently fill a position in the United States with a noncitizen, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). 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 noncitizen 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). 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 noncitizen may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

The issues on appeal are whether the Petitioner's job offer is bona fide, whether the Beneficiary is qualified for the offered position, and whether the Beneficiary is eligible for the skilled worker classification. Upon a review of the evidence, we will withdraw the Director's finding that the Petitioner's job offer was not bona fide. Additionally, we conclude that while the Petitioner has not provided sufficient evidence to establish the Beneficiary's qualifications for the offered position or eligibility for the requested classification, the Director did not provide an adequate analysis of the evidence regarding the Beneficiary's work experience, and therefore did not grant the Petitioner a meaningful opportunity to respond. Therefore, we will withdraw the decision and remand the matter for the issuance of a new request for evidence (RFE) and decision.

A. Bona Fide Job Offer

An employer filing a labor certification 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* 20 C.F.R. § 656.17(1).

In their denial, the Director found that since the Beneficiary applied for the offered position before the labor certification was filed, the Petitioner's job offer was not clearly open to U.S. workers and therefore was not bona fide.

Because of the design of the labor certification process, every petitioner who files a labor certification has already identified a noncitizen they wish to hire prior to the required recruitment. The fact that the Beneficiary applied for the offered position prior to the required recruitment does not indicate that the job was not open to U.S. workers. Rather, it indicates that the Petitioner followed DOL regulations in advertising for the job opportunity after identifying a foreign national to hire for the position. *See, e.g.*, 20 C.F.R. § 656.17.

For the above reasons, the record does not support the conclusion that the job offer was not clearly open to U.S. workers. We will withdraw this finding.

B. Beneficiary Qualifications and Eligibility for the Skilled Worker Classification

The Petitioner seeks a third preference immigrant visa to employ the Beneficiary as a skilled worker. A skilled worker is one who, as of the time of filing, has at least two years of qualifying training or experience. 8 C.F.R. § 204.5(l)(3)(ii)(B). Additionally, a petitioner must establish a beneficiary's possession of the DOL-certified job requirements of an offered position by a petition's priority date. *Id.*; *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Evidence relating to qualifying work experience shall be in the form of letters from the relevant employers and include the name, address, and title of the writer, as well as a specific description of the duties the beneficiary performed. If such evidence is unavailable, alternative documentation will be considered. 8 C.F.R. § 204.5(g)(1).

In this instance, the labor certification states that the offered position requires two years of experience as a chef, and that no alternative education, training, or experience will be accepted. The Petitioner certified that the Beneficiary meets this requirement through her experience working as a chef at [redacted] from January 2, 2014, to May 19, 2017, and submitted an experience letter to support this claim. The Director issued an RFE noting, among other things, that the employer letter provided was insufficient because it did not include the writer's name, address, or title or a specific description of the Beneficiary's duties, as required by regulation. *Id.*

The Petitioner responded with a new experience letter which included the required information. The Director then issued a Notice of Intent to Deny (NOID) because the claimed employment dates contradicted information the Beneficiary had previously given when applying for a nonimmigrant visa (NIV). In the NIV application she submitted on May 23, 2017, the Beneficiary gave her occupation as being a university student, and answered "no" to the question about whether she had been previously employed. Since this contradicted the current petition's claim that she had worked as a full-time chef for over three years prior to that time, the Director requested further evidence of the Beneficiary's qualifications for the offered position and eligibility for the skilled worker classification.

In response, the Beneficiary provided an affidavit stating that while she was a full-time student at the time of her NIV application, she worked at [redacted] on weekdays from 3 p.m. to 8 p.m. after her classes ended, worked 16 hours on weekends, and worked 60 hours a week during the summer. She further stated that she omitted this information from her NIV application because she did not believe it was relevant to an application for a student visa. The Director denied the petition, concluding that the letter was not probative or credible evidence. On appeal, the Petitioner asserts that this conclusion was erroneous and that there is sufficient evidence in the record to establish the Beneficiary's qualifications.[1]

Upon review, the Petitioner has not provided sufficient evidence to establish the Beneficiary's qualifications for the offered job or her eligibility for the requested classification. As noted by the Petitioner on appeal, the experience letter it provided in response to the RFE meets the requirements of 8 C.F.R. § 204.5(g)(1), which is normally sufficient to establish a beneficiary's qualifying work experience. However, where there are inconsistencies in the evidence, the Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The experience letter in this case was inconsistent with other evidence because it claimed the Beneficiary was a full-time chef during the same time period

[1] The Petitioner also contends that the Director violated its constitutional right to due process, citing various federal cases regarding the right to a meaningful hearing before being deprived of one's property or other constitutionally protected interest. However, it has not identified a protected interest the Director's denial deprived it of. *See, e.g., Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990) (finding that there is no inherent property right in an immigrant visa); *Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment.") (*citations omitted*). As such, we will not address this contention further.

her NIV application stated she was a full-time student and had no previous employment. The affidavit provided in response to the NOID, while relevant, was not accompanied by pay statements, tax documents, payroll documents, or other independent, objective documentation of her employment at [redacted] It is therefore insufficient to resolve the inconsistencies between the labor certification and the NIV application and to establish that the Beneficiary has two years of full-time work experience as a chef, as required for the offered position and the skilled worker classification. *Id.*

However, while the Petitioner has not provided sufficient evidence to establish eligibility, the Director did not fully and clearly explain the deficiencies in that evidence before denying the petition. 8 C.F.R. §§ 103.2(b)(8)(iii), 103.3(a)(1)(i); *see generally* 1 *USCIS Policy Manual* E.6(F)(4), https://www.uscis.gov/policymanual. The NOID explained that the experience letter provided in response to the RFE, despite complying with 8 C.F.R. § 204.5(g)(1), was insufficient to establish eligibility due to how its information conflicted with that in the Beneficiary's past NIV application. However, the NOID did not explain that the Petitioner had to submit independent, objective evidence to resolve the inconsistencies in the record or identify examples of evidence that could be submitted to do so, and the subsequent denial did not provide any reason for finding that the Beneficiary's affidavit was not probative or credible.[2] Because the Director denied the petition without a full analysis of the evidence and its deficiencies, we will withdraw the denial for the issuance of a new RFE and decision.

C. Ability to Pay

Beyond the decision of the Director, we note that the record does not establish the Petitioner's continuing ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states that a petitioner must establish that it has the continuing ability to pay the proffered wage from the priority date[3] onward. Documentation of the ability to pay shall be in the form of copies of annual reports, federal tax returns, or audited financial statements, and in appropriate cases, additional financial evidence may be submitted. *Id.* In the present case, the Petitioner submitted a labor certification stating it would pay the Beneficiary an annual wage of $47,362 and must establish its continuing ability to pay this wage starting on the priority date of January 24, 2020.

USCIS records indicate that the Petitioner has filed several other Form I-140 petitions for other beneficiaries. Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). The Petitioner here must therefore establish its ability to pay not only the Beneficiary of this petition, but also the beneficiaries of the other petitions that were pending or approved as of the Beneficiary's priority date, as well as those filed after the priority date.[4]

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[2] *See generally* 1 USICS Policy Manual, *supra* at E.6(D)(2) ("[I]t generally is not enough to simply say that the witness is not credible. Instead, the officer's decision should give the specific reason(s) for the conclusion and refer to evidence in the record that supports the conclusion.").

[3] The "priority date" of a petition is the date the underlying labor certification is filed with DOL. 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

[4] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

When determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary).[5]

If a petitioner's net income and net current assets are insufficient, USCIS may, at its discretion, consider other relevant factors, such as the number of years the petitioner has been in business, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

Because the Petitioner has never employed the Beneficiary or paid her a wage, it must show its ability to pay the entire proffered wage from 2020 onwards. The 2020 and 2021 federal tax returns submitted with the petition establish that the Petitioner's net income was sufficient to pay the Beneficiary's wage in those years, but the record does not include any evidence regarding the other I-140 petitions. This evidence is insufficient to establish that the Petitioner has maintained the continuing ability to pay the proffered wage since the petition priority date. On remand, the Director should issue an RFE requesting a list of all of the Petitioner's pertinent Forms I-140, their proffered wages, and their current status, as well as documentation of the Petitioner's ability to pay all of its pertinent beneficiaries starting on the priority date.

III. CONCLUSION

The Petitioner has not resolved the inconsistencies regarding the Beneficiary's foreign employment and established with independent, objective evidence that the Beneficiary possesses the 24 months of experience required for the offered position and the skilled worker classification. However, given the previously-described deficiencies in the denial, we will withdraw the Director's decision and remand it for the issuance of a new RFE and a new determination of the Beneficiary's eligibility. We will also withdraw the Director's finding that the Petitioner's job offer was not bona fide.

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

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion;
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary; or
- In any year when the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

[5] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014); *aff'd*, 627 Fed. App'x 292, 294-95 (5th Cir. 2015); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-46 (S.D. Cal. 2015).