U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26912689

Date: JUN. 6, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a sole proprietor of a donut shop, seeks to permanently employ the Beneficiary as a donut baker. The Petitioner requests his classification under the third-preference, immigrant visa category as an "other worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This category allows a prospective U.S. employer to sponsor a noncitizen for lawful permanent residence to work in a job requiring less than two years of training or experience. *Id.*; 8 C.F.R. § 204.5(l)(2) (defining the term "other worker").

After initially granting the petition, the Director of the Texas Service Center revoked the filing's approval. The Director concluded that the Petitioner did not establish the availability of the offered position to U.S. workers. On appeal, the Petitioner contends that, although she knew the Beneficiary before applying for the accompanying certification from the U.S. Department of Labor (DOL), the job opportunity is bona fide.

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 Director lacked authority to determine the job opportunity's bona fides and will therefore withdraw his decision. But the record does not demonstrate the Petitioner's required ability to pay the offered position's proffered wage. We will therefore remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as an other, or unskilled, worker generally follows a three-step process. First, a prospective employer must obtain 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 position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an 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)(D), (4).

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, however, 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 sufficient evidence, the erroneous nature of a petition's 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 if the unrebutted and unexplained record would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). The Agency properly revokes a petition's approval if a petitioner does not respond to a properly issued NOIR, or their NOIR response does not overcome all alleged revocation grounds. *Id.* at 451-52.

II. ANALYSIS

A. Bona Fides of the Job Opportunity

A labor certification employer must attest that its "job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). If an employer's owner or officer has a family relationship with a sponsored noncitizen or the noncitizen would be one of a small number of employees, the employer must be able to demonstrate the job's availability to all U.S. workers. 20 C.F.R. § 656.17(l).

The Director's NOIR describes various ties that existed between the Petitioner and the Beneficiary before the labor certification application's filing in 2015. The NOIR notes that USCIS records indicate the Beneficiary's U.S. residence with the Petitioner and her spouse from 2000 to 2003. Asked in part C.9 of the labor certification "is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?' the Petitioner indicated "No." But, as the Petitioner and the Beneficiary share the same South Korean nationality and family name, the NOIR alleges a family relationship between them. Also, the Petitioner indicated on the Form I-140, Immigrant Petition for Alien Workers, that this was the first immigrant visa petition for the Beneficiary. But USCIS records show that the Petitioner and her spouse operated a prior business that petitioned for the Beneficiary in 2006.

In response to the NOIR, the Petitioner admitted that she knew the Beneficiary before 2015. She stated that: her spouse supervised him at an electronics business in South Korea from 1980 to 1983; she and her spouse rented him, his spouse, and two children a room in their home from 2000 to 2003; and the prior electronics business of the Petitioner and her spouse unsuccessfully sponsored him for U.S. lawful permanent residence. But the Petitioner denied any family relationship between her and the Beneficiary. As evidence of the job opportunity's bona fides, the Petitioner submitted evidence that she has employed the Beneficiary in the offered position since October 2019, after he received an employment authorization document allowing him to legally work in the United States. *See* 8 C.F.R. § 274a.12(c)(9).

The Director found that "the evidence demonstrates that the petitioner and beneficiary already knew one another, and that the relationship made it easier for the beneficiary to obtain a job from the petitioner." The Director also stated that "the evidence does not show that the petitioner made the attempt to have the job offer available to all eligible U.S. workers, but solely for the purpose of hiring the beneficiary."

But, as previously indicated, Congress authorized DOL - not USCIS - to determine "that 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, USCIS lacks authorization to determine the offered position's availability to U.S. workers.

Even if USCIS had authority to consider the job opportunity's bona fides, the Director did not properly analyze the availability of the position to U.S. workers. Adjudicators must consider a variety of factors under a totality-of-the-circumstances analysis. *See Matter of Modular Container Sys., Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The Director cited *Modular Container* but did not consider and weigh the relative factors as the case requires.

For the foregoing reasons, the Director improperly found insufficient evidence of the job opportunity's bona fides. We will therefore withdraw the Director's decision.

B. Ability to Pay the Proffered Wage

The appeal overcomes the revocation ground. But the record does not establish the petition's approvability. The Petitioner has not demonstrated her required ability to pay the offered position's proffered wage.

A petitioner must demonstrate its continuing ability to pay an offered position's proffered wage, from a petition's priority date onward. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of a petitioner's annual reports, federal tax returns, or audited financial statements. *Id.*

The Petitioner's labor certification states the proffered wage of the offered position of donut baker as $19,000 a year. The petition's priority date is July 17, 2015, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

USCIS initially approved the petition in February 2019. The Petitioner therefore had to demonstrate its ability to pay the proffered wage from 2015, the year of the petition's priority date, until 2019. *See Matter of Estime*, 19 I&N Dec. at 451 (asking if the unrebutted and unexplained record would have warranted a petition's denial). As a sole proprietor, the Petitioner's business does not constitute an entity separate from her. Thus, in determining her ability to pay the proffered wage, USCIS considers her personal income, assets, and expenses, along with her ability to support herself and any dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As proof of the Petitioner's ability to pay the proffered wage, she submitted a copy of her federal income tax return for 2014. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks required evidence of her ability to pay the proffered wage from 2015, the year of the petition's priority date, onward to 2019. Thus, at the time of the petition's approval, the record did not demonstrate the Petitioner's continuing ability to pay the proffered wage. The Director did not inform the Petitioner of this evidentiary deficiency. We will therefore remand the matter.

On remand, the Director should issue a new NOIR, informing the Petitioner of her need to demonstrate her ability to pay the proffered wage and affording her a reasonable opportunity to respond with evidence, argument, or both. She must provide regulatory required evidence of her ability to pay from 2015 to 2019. The Petitioner must also provide summaries of her expenses for each year.

If supported by the record, the new NOIR may include additional, potential grounds of revocation. The Director, however, must inform the Petitioner of each ground and provide her 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 Director improperly found insufficient evidence of the job opportunity's bona fides. The Petitioner, however, did not demonstrate her 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.