U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28048480

Date: AUG. 21, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a construction company, seeks to permanently employ the Beneficiary as a foreman. The company requests his classification under the employment-based, third-preference (EB-3) immigrant visa category as a skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). Prospective employers may sponsor noncitizens for permanent residence in this category to work in jobs requiring at least two years of training or experience. *Id.*

The Director of the Texas Service Center denied the petition and dismissed the Petitioner's following combined motions to reopen and reconsider. The Director concluded that the company did not demonstrate the offered job's availability to U.S. workers and willfully concealed a business relationship between the company and the Beneficiary's brother. On appeal, the Petitioner contends that the Director cited unreliable proof of the business relationship, disregarded evidence of the job offer's bona fides, and erred in finding a misrepresentation.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). 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 findings regarding the offered job's availability to U.S. workers or the Petitioner's alleged misrepresentation. We will therefore withdraw the Director's decision. The company, however, did not demonstrate its required ability to pay the job's proffered wage or the Beneficiary's qualifying experience for the position and the requested immigrant visa category. We will therefore also remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) 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)(B).

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.

II. ANALYSIS

A. The Petitioner's Alleged Misrepresentation and the Offered Job's Availability

A petitioner's willful misrepresentation of a material fact may justify a petition's denial. USCIS can approve a filing only if the Agency finds that "the facts stated in the petition are true." Section 204(b) of the Act. A petition includes any supporting evidence - including a labor certification. 8 C.F.R. § 103.2(b)(1). Thus, USCIS cannot approve a petition if the facts stated on an accompanying labor certification are untrue.

Also, an employer must attest on a labor certification that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8).

> Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a bona fide job opportunity.

Matter of Modular Container Sys., Inc., 1989-INA-228, *7 (BALCA July 16, 1991) (*en banc*); *see* Final Rule for Permanent Labor Certification Applications, 69 Fed. Reg. 77326, 77356 (Dec. 27, 2004) (incorporating *Modular Container*'s holdings into current DOL labor certification regulations).

In response to the Director's notice of intent to deny the petition in September 2020, the Petitioner submitted copies of IRS Forms 1099-MISC, Miscellaneous Income. The forms show that the Petitioner, which stated its employment of seven people, paid a company owned by the Beneficiary's brother $1,536,328.04 in 2018 and $701,450 in 2019. In affidavits, the Petitioner's president and the Beneficiary's brother attested that, from July 2014 to October 2020, the brother's company served as a subcontractor to the Petitioner on various construction projects.

Because of the Petitioner's small number of employees and its business relationship with the Beneficiary's brother, the Director concluded that the Petitioner did not demonstrate the offered job's availability to U.S. workers.

The Director also found that the Petitioner willfully concealed its business relationship with the Beneficiary's brother. Part C.9 of the accompanying labor certification application asked the Petitioner: "Is the employer a closely held corporation, partnership, or sole proprietorship in which

the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" The company indicated "No." Because the Petitioner did not disclose its business relationship with the Beneficiary's brother, however, the Director found that the company's response to part C.9 willfully misrepresented material facts regarding the offered job's availability to U.S. workers.

As the Petitioner contends, however, the record does not support the company's alleged misrepresentation of facts in part C.9 of the labor certification. The record shows that the company of the Beneficiary's brother provided services to the Petitioner from 2014 to 2020. But there is no evidence that he ever held an ownership interest in the petitioning limited liability company. Similarly, the record shows a family relationship between the Beneficiary and his brother. But there is no evidence of a family relationship between the Beneficiary's brother and the Petitioner's owners or officers. Thus, the record lacks sufficient evidence that the Petitioner's part C.9 response misrepresented facts.[1]

For the foregoing reasons, the Petitioner did not misrepresent a material fact on the labor certification or insufficiently demonstrate the offered job's availability to U.S. workers. We will therefore withdraw the Director's contrary findings.

B. Ability to Pay the Proffered Wage

The appeal overcomes the denial grounds. But the record does not establish the petition's approvability. Although unaddressed by the Director, the Petitioner has not demonstrated its 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 until a beneficiary obtains 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.*

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 pay any differences between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may also 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).[2]

The Petitioner's labor certification states the proffered wage of the offered position of construction foreman as $76,000 a year. The petition's priority date is May 3, 2019, the date DOL accepted the

[1] The Petitioner would have had to demonstrate the offered job's availability based on the company's small number of employees if DOL had requested the demonstration in an audit. *See* 20 C.F.R. § 656.17(l). The record reflects DOL's audit of the labor certification application before its certification.

[2] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, Inc. v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Four Holes Land & Cattle, LLC v Rodriguez*, No. 5:15-cv-03858, 2016 WL 4708715, **4-5 (D.S.C. Sept. 9, 2016).

labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The record does not indicate that the Petitioner has ever paid the Beneficiary. Thus, based solely on wages paid, the company has not demonstrated its ability to pay the proffered wage.

The Petitioner submitted a copy of its federal income tax return for 2018. But, contrary to 8 C.F.R. § 204.5(g)(2), the record lacks copies of annual reports, federal tax returns, or audited financial statements for 2019, the year of the petition's priority date, or thereafter. The company therefore has not demonstrated its ability to pay the proffered wage.

Also, USCIS records indicate the Petitioner's filing of Forms I-140, Petitions for Alien Workers, for two other beneficiaries that were pending or approved after this petition's priority date.[3] A petitioner must demonstrate its ability to pay the proffered wages of all petitions it files before a beneficiary obtains permanent residence. 8 C.F.R. § 204.5(g)(2). This Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this and its other two petitions that were pending or approved after this petition's May 3, 2019 priority date. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay multiple beneficiaries).[4]

For the foregoing reasons, the record does not demonstrate the Petitioner's ability to pay the combined proffered wages of the applicable petitions. As the Director did not notify the company of these evidentiary deficiencies, we will remand the matter.

On remand, the Director should explain the deficiencies to the Petitioner and afford it a reasonable opportunity to respond. The company must provide copies of annual reports, federal tax returns, or audited financial statements for 2019 through 2022. The Petitioner may also submit additional evidence of its ability to pay during that period, including proof of any payments to the Beneficiary or other applicable beneficiaries, and materials supporting factors stated in *Sonegawa*.

C. The Required Experience

Also unaddressed by the Director, the Petitioner did not demonstrate the Beneficiary's qualifying experience for the offered position and the requested immigrant visa category.

A skilled worker must have at least two years of training or experience. Section 203(b)(3)(A)(i) of the Act. Also, a petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). When assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's

[3] USCIS records identify the Petitioner's other Form I-140s by the following receipt numbers: [redacted] and [redacted]

[4] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of their corresponding petitions or after their corresponding beneficiaries obtain permanent residence. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(2), www.uscis.gov/policy-manual.

minimum requirements. USCIS may neither disregard certification terms nor impose unstated requirements. *See, e.g., Madany*, 696 F.2d at 1015 (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The Petitioner's labor certification states the minimum requirements of the offered position of construction foreman as a U.S. high school diploma or a foreign equivalent, plus two years of experience "in the job offered." On a labor certification, the phrase "in the job offered" means experience performing the key job duties of an offered position as listed on a certification. *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *3 (BALCA Oct. 24, 2011) (citations omitted). The Petitioner indicated on the labor certification that it would not accept experience in an alternate occupation. Also, part H.14 of the labor certification, "Specific skills or other requirements," states: "The required experience must include a minimum of 12 months experience [with] a company engaged in providing condominium development services."

On the labor certification, the Beneficiary claimed that, by the petition's priority date, he gained more than three years of full-time, qualifying experience in Turkey. He stated that a construction/condominium development company employed him as a construction foreman from July 2014 to December 2017. He did not indicate any other experience.

To demonstrate claimed qualifying experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must contain the employer's name, title, and address, and a description of the beneficiary's experience. *Id.*

Consistent with 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner submitted a letter from the Beneficiary's purported former employer. The Petitioner also submitted copies of payroll records for the claimed employment period. The payroll records sufficiently establish the length of the Beneficiary's work. But other evidence of record cast doubts on the experience letter's accuracy.

In a May 2020 affidavit, the purported general manager of the Beneficiary's former employer identified the person who owned the business before January 2017. That owner's name matches the name of the Beneficiary's father, as listed on copies of the Beneficiary's Turkish high school diploma and marriage certificate and their English translations.[5] Also, U.S. government records show that, on a 2018 application for a U.S. visitor's visa, the Beneficiary's spouse identified herself as the owner of the Beneficiary's former employer. Further, the former employer's website indicates the business's manufacture of "agricultural and livestock machinery equipment," including: mowers; tillage machinery; and milking systems. But, contrary to the Beneficiary's attestation on the labor certification, the website does not mention the business's provision of construction or condominium development services. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies).

The omission of construction and condominium development services on the Turkish business's website casts doubt on the Beneficiary's claimed qualifying experience for the offered position. Also, evidence shows that members of his family have owned the business, casting additional doubt on the

[5] The Beneficiary submitted the copy of his marriage certificate and its English translation with his application for adjustment of status.

potentially biased experience documents for him. Because of the omitted website information, the family relationships, and the absence of other corroborating evidence, the Petitioner has not demonstrated the Beneficiary's claimed qualifying experience. *See Matter of Chawathe*, 25 I&N Dec. at 376 (stating that USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true").

For the foregoing reasons, the record does not establish the Beneficiary's qualifying experience for the offered position or the requested immigrant visa category. As the Director did not notify the Petitioner of these evidentiary deficiencies, the Director should notify the company on remand. The company must resolve the discrepancies of record and establish the Beneficiary's claimed qualifying experience with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591.

If supported by the record, the Director may notify the Petitioner of any other potential denial grounds. The Director, however, must notify the company of all issues raised on remand and provide it with a reasonable opportunity to respond. 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 denial grounds. The Petitioner, however, has not demonstrated its ability to pay the offered position's proffered wage or the Beneficiary's qualifying experience for the job and the requested immigrant visa category.

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