



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 12263256

Date: JUL. 19, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a project engineer. It requests classification of the Beneficiary under the third-preference, immigrant classification for professional workers, Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, “EB-3” category allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition and dismissed a subsequent motion to reopen and reconsider, concluding that the record did not establish that the Petitioner made a *bona fide* job offer.

In these proceedings, it is the Petitioner’s burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. See *Matter of Christo’s Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will withdraw the decision of the Director. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

I. EMPLOYMENT-BASED IMMIGRATION

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.

II. *BONA FIDE* JOB OPPORTUNITY

In this case, the accompanying labor certification was filed on March 27, 2018.¹ The Petitioner in this matter is a construction business with seven employees. The Petitioner checked “no” to question C.9 on the labor certification, “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, corporate officers, incorporators, or partners, and the alien?” The labor certification also states that the recruitment for the offered position began on October 14, 2017.

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). Here, the Director issued a notice of intent to deny (NOID) the petition, noting that the record included an Immigration and Customs Enforcement Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, issued to the Beneficiary and identifying the Petitioner’s president and majority shareholder as the Beneficiary’s “sponsor (cousin).” The Director determined that the existence of a familial relationship between the Petitioner and the Beneficiary cast doubt on whether a *bona fide* job offer exists.²

The Petitioner responded to the NOID with statements from both the Petitioner’s president and the Beneficiary stating that no family relationship exists between them. In support of this assertion, the Petitioner submitted family records for the Petitioner’s president’s paternal and maternal grandfathers and for the Beneficiary, his father and his maternal grandfather. The Beneficiary also states that the Petitioner’s president was incorrectly listed as his cousin on Form I-20 and submits a corrected Form I-20 that no longer includes the name of, or any relationship to, a sponsor.

In attempt to establish that a *bona fide* job offer exists, the Petitioner submitted evidence of its recruitment for the offered position, including the determination of the prevailing wage, a job order placed with the state workforce agency, newspaper and internet advertisements, an internal posting notice, two resumes received in response to the recruitment efforts, and a report of recruitment results explaining why two individuals were rejected for the offered position. The Petitioner also submitted its articles of organization and business license. In his statement, the Petitioner’s president asserts that his brother employed the Beneficiary in Turkey, he met the Beneficiary for the first time in the United States, they became friends over time, and his friendship with the Beneficiary did not influence the Petitioner’s recruitment efforts.

¹ The “priority date” of a petition is the date the underlying labor certification is filed with the DOL. See 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.

² The petitioner has the burden of establishing that a *bona fide* job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); see also 8 U.S.C. § 1361; 20 C.F.R. § 656.17(l).

After receiving the Petitioner's response to the NOID the Director denied the petition. The Director found that despite evidence demonstrating that no familial relationship exists between the Petitioner's president and the Beneficiary, and evidence that the Petitioner "did make proper recruitment efforts," the record demonstrates that there is a "standing friendship that includes [the Petitioner's president] paying for the beneficiary's education." The Director concluded as follows:

[The] fact that the petitioner has known the beneficiary for some period of time, the fact that the president, . . . , pays for the beneficiary's education, and the fact that the president already had the beneficiary in mind before the recruitment efforts were even made, indicates that the petitioner did not make a bona fide job offer.

The Director subsequently dismissed the Petitioner's motion to reopen and reconsider, stating that "the [P]etitioner did not submit a statement about whether the decision that is the basis of the motion is, or has been, the subject of any judicial proceeding; and if so, the court, nature, date, and status or result of the proceeding." However, the Petitioner's motion did include such a statement, verifying that the decision has not been the subject of any judicial proceeding.

In his dismissal of the motions, the Director also states that "it appears the president of the petitioning company, . . . , had the beneficiary in mind when the recruitment efforts began. It appears the petitioner went through the recruitment steps in order to file the Form I-140."

On appeal the Petitioner states that, despite its good faith recruitment efforts, it was not able to find any qualified U.S. workers for the proffered position. The Petitioner asserts that the Director "ignored or misconstrued" evidence submitted in response to the NOID and with its motions, including evidence to establish that the Petitioner's president did not pay for the Beneficiary's education. The Petitioner also outlines the factors to be examined to establish the existence of a *bona fide* job offer, as set forth in *Modular Container*, including the foreign worker's influence and control over job opportunity.³ The Petitioner notes that the Director did not address these factors in his decisions.

Because of the design of the labor certification process, every petitioner who files a labor certification has already identified a foreign national that they wish to hire prior to the required recruitment. The Petitioner's identification of the Beneficiary prior to the required recruitment, or even its employment of the Beneficiary in the offered job, does not indicate that the job is 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 for the position. *See, e.g.*, 20 C.F.R. § 656.17. Thus, the Director erred in denying the petition for lack of a *bona fide* job opportunity solely due to the Petitioner's identification of the Beneficiary as an applicant prior to the commencement of the labor certification recruitment process.

The Director did not properly consider the Petitioner's evidence that the job opportunity is *bona fide*. We will therefore withdraw the Director's decision and remand the matter for consideration of evidence in support of the factors outlined in 20 C.F.R. § 656.17(l). Those factors include whether the 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

³ *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA Jul. 16, 1991) (*en banc*).

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.*

We note that although the Petitioner's president and the Beneficiary deny the existence of any familial relationship, the record does not include an explanation of how the Form I-20 came to incorrectly identify the Petitioner's president as the Beneficiary's "cousin." We further note that the family records submitted in response to the NOID show that the Beneficiary's paternal grandfather and the Beneficiary's paternal grandmother share the same family name, which is also the Beneficiary's family name. The names of both sets of paternal great grandparents are also similar. On remand, the Petitioner should address whether this potential family relationship exists and provide an explanation of how the error on the Form I-20 came to be.⁴

III. ABILITY TO PAY

Although not discussed by the Director, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage of \$62,000 per year, from the priority date on March 27, 2018, and continuing until the beneficiary obtains lawful permanent residence. The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2018 onward. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

Therefore, on remand the Director should analyze the record and determine whether the Petitioner has established its ability to pay the proffered wage. The Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

IV. CONCLUSION

Considering the above discussed deficiencies, we are withdrawing the Director's decision and remanding the petition to allow the Petitioner an opportunity to address the factors identified above. Further, the record does not contain priority date year documentation to determine whether the Petitioner has the ability to pay the proffered wage to the Beneficiary as required by 8 C.F.R. § 204.5(g)(2). Therefore, we will remand this case to the Director for further consideration of the existence of a *bona fide* job offer and the Petitioner's ability to pay the proffered wage from the priority date onward.

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

⁴ Additionally, 20 C.F.R. § 656.17(i)(4) states, "In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants." Here, the Form I-20 lists the Petitioner's president as the Beneficiary's sponsor, providing funds of \$111,785 for language training at an English Language Institute. In any further filings, the Petitioner should also address whether the actual requirements of the offered position include English language.