U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17448270

Date: SEP. 22, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for a Skilled Worker

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

The petition was initially approved by the Director of the Texas Service Center on May 10, 2006. The approval was subsequently revoked on November 30, 2009, by the Director of the Nebraska Service Center, on multiple grounds. The Director found that the Petitioner committed fraud or willfully misrepresented material facts in the labor certification with respect to its work address and the familial relationship between the Beneficiary and the Petitioner's owner/corporate officers. Based on the finding of fraud or willful misrepresentation of material facts the Director invalidated the labor certification and revoked the approval of the petition on the ground that it was not supported by a valid labor certification. As an additional ground for denial, the Director found that the Petitioner did not establish its ability to pay the proffered wage in the years 2006, 2007, and 2008, and thus did not establish its continuing ability to pay the proffered wage from the priority date of November 2, 2005, onward.

The Petitioner filed an appeal, which we dismissed. The Petitioner has since then filed 13 motions to reopen and reconsider, 12 of which we have dismissed and the latest of which is currently before us. Upon review, we will dismiss the combined motion.

I. MOTION REQUIREMENTS

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our previous decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence of record at the time of the decision. 8 C.F.R. § 103.5(a)(3).

As a preliminary matter, we note that motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

II. ANALYSIS

A. Petitioner's Ability to Pay the Proffered Wage

In prior decisions we found, consistent with the revocation decision in 2009, that the Petitioner had not established its ability to pay the proffered wage in the years 2006-2008. In the current motion the Petitioner refers to previously submitted evidence relating to those years which has already been considered in our previous decisions. No new facts are submitted with the current motion, nor any new documentation related to the Petitioner's ability to pay the proffered wage in the years 2006-2008. Nor does the Petitioner identify any incorrect application of law or policy in our prior decision(s) with regard to the Petitioner's ability to pay the proffered wage during the years 2006-2008.

Accordingly, the Petitioner has not shown proper cause for reopening the proceedings or reconsidering our decision(s) on the issue of its continuing ability to pay the proffered wage from the priority date of the petition until the date of revocation. The combined motion is dismissible on this ground alone.

B. Fraud or Willful Misrepresentation of Material Facts

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien entitled to immigrant classification under the Act may file a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); *see* 8 C.F.R. § 204.5(c). Such petitions must be accompanied by a labor certification from the DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5); *see also* 8 C.F.R. § 204.5(l)(3)(i). The Petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary under the terms of the labor certification); s*ee also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where the labor certification did not remain valid for the intended geographic area of employment). Because the filing of a labor certification establishes a priority date for any immigrant petition later based on the labor certification, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The *bona fides* of the job opportunity are essential elements in evaluating whether a job offer is realistic. *See Matter of Great Wall,* 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

The Act requires USCIS to determine eligibility for the visa classification requested. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Certain classifications require a labor certification to establish eligibility. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 204.5(l)(3)(i). Section 204(b) of the Act allows a petition's approval only

after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b). For those petitions requiring a labor certification, USCIS's investigation into the facts must include consultation with DOL. *Id.* Thus, the labor certification is not conclusive evidence of eligibility. Instead, it is a pre-condition to being eligible to file a Form I-140. USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. §103.2(b)(i). USCIS is required to approve an employment-based immigrant visa petition only where it is determined that the facts stated in the petition, which incorporates the labor certification, are true and the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b).

As the Director indicated in the revocation decision and we have affirmed in every decision since then, the record shows that the facts stated in the petition, which incorporates the labor certification, were not true insofar as the Petitioner denied the existence of a familial relationship between its owner and the Beneficiary. Thus, the petition did not meet the basic requirement of section 204(b) of the Act because not all of the stated facts were true. No new facts are submitted with the current motion, nor any new documentation related to the material misrepresentation on the labor certification regarding the familial relationship between the Petitioner and the Beneficiary. Nor does the Petitioner identify any incorrect application of law or policy in our prior decision(s) with regard to this issue.

Accordingly, the Petitioner has not shown proper cause for reopening the proceedings or reconsidering our decision(s) on the issue of its misrepresentation of a material fact concerning the familial relationship between its owner and the Beneficiary. The combined motion is dismissible on this ground as well.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not shown proper cause for reopening the proceedings or reconsideration of our prior decision(s). Therefore, the Petitioner has not established eligibility for the benefit sought.[1]

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

[1] The petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).