U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-R-&H-C-C-.

DATE: AUG. 7, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a nursing home operator, seeks to employ the Beneficiary as a unit manager. It requests his classification under the second-preference immigrant category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master's degree, or a bachelor's degree followed by five years of experience.

The Director of the Nebraska Service Center denied the petition, which also sought the position's designation as a nurse under Schedule A. The Director concluded that, contrary to U.S. Department of Labor (DOL) regulations, the Petitioner did not properly notify its employees of the accompanying application for permanent employment certification. Specifically, the Director found that the Petitioner's notice of filing contained an incorrect website address of a DOL official to whom workers could send evidence regarding the application.

On appeal, the Petitioner requests the decision's reversal, arguing that the website address might have been valid when the company posted the notice to its employees.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional typically follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer usually must seek DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). If DOL approves a position, an employer next submits the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. If USCIS grants a petition, a foreign national may finally apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

DOL, however, has already determined that the United States lacks sufficient nurses and that employment of foreign nationals in these Schedule A positions will not harm the wages or working conditions of U.S. nurses. 20 C.F.R. § 656.5. DOL therefore authorizes USCIS to adjudicate labor certification applications for Schedule A designation in petition proceedings. 20 C.F.R. § 656.15(a). Thus, in this matter, USCIS rules not only on the petition, but also on its accompanying labor certification application. *See* 20 C.F.R. § 656.15(e) (describing USCIS's labor certification determination in Schedule A proceedings as "conclusive and final").

II. THE NOTICE OF FILING

Unless accompanied by a valid, individual labor certification from DOL or documentation of a beneficiary's qualifications for a shortage occupation, a petitioner for an advanced degree professional must include an application for Schedule A designation. 8 C.F.R. § 204.5(k)(4)(i). A Schedule A application must contain evidence that an employer notified its employees of the application's filing pursuant to DOL regulations. 20 C.F.R. § 656.15(b)(2). When an employer offers a non-unionized position to a foreign national, it must document that it posted notice of the application's filing to employees at the proposed worksite for at least 10 consecutive business days. 20 C.F.R. § 656.10(d)(1)(ii).[1] The notice must: indicate that the posting stems from the filing of a certification application for the offered position; state that anyone may send documentary evidence about the application to the DOL certifying officer; list the address of the appropriate officer; and be posted between 30 and 180 days before the application's filing. 20 C.F.R. § 656.10(d)(3). A notice in a Schedule A case must also describe the job and rate of pay. 20 C.F.R. § 656.10(d)(6).

Here, the Petitioner submitted the filing notice it posted regarding its labor certification application for the offered position of unit manager. In relevant part, the notice states:

> Any person may provide documentary evidence bearing on the application to the Certifying Officer of the U.S. Department of Labor holding jurisdiction over the location of the proposed employment. Contact information for these offices can be found on the internet at **http://www.foreignlabor.doleta.gov/foreign/contacts.asp**.

(emphasis in original).

The language quoted above virtually matches that in a sample filing notice developed by DOL and USCIS. USCIS included a copy of the sample in a 2006 guidance memorandum. *See* Memorandum from Michael Aytes, USCIS Acting Assoc. Dir., Domestic Ops., *AFM [Adjudicator's Field Manual] Update: Chapter 22: Employment-based Petitions (AD03-01)*, HQPRD70/23.12 18-19 (Sept. 12, 2006), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives201998-2008/2006/afm_ch22_ 091206r.pdf (last visited May 9, 2019).[2] The memo states: "Adjudicators should accept posting notices that are modeled after the sample." *Id.* at 18.

[1] If an offered position is unionized, an employer must notify the bargaining representative of its employees who work in the same occupational classification and area of intended employment. 20 C.F.R. § 656.10(d)(1)(i).

[2] *See also USCIS Adjudicator's Field Manual*, ch. 22.2(b)(4)(C)(v), https://www.uscis.gov/sites/default/files/ocomm/ilink/0-0-0-6423. html#0-0-0-417 (last visited May 9, 2019).

The Director, however, concluded that, contrary to 20 C.F.R. § 656.10(d)(3)(iii), the Petitioner's filing notice did not "[p]rovide the address of the appropriate Certifying Officer." The Director found that the Petitioner's notice listed "an incorrect website address." When we attempted to access the listed website, a message stated: "This site can't be reached. The webpage . . . might be temporarily down or it may have moved permanently to a new web address." *See* http://www.foreignlabor.doleta.gov/foreign/contacts.asp. (last visited May 9, 2019).

The similarities between the Petitioner's filing notice and the sample published by USCIS indicate that the company modeled its notice on the sample. Although USCIS stated that adjudicators should accept such notices, DOL's interpretation of the Act and the agency's regulations support the Director's rejection of the Petitioner's notice. The regulations clearly require the notice to include the address of the certifying officer. 20 C.F.R. § 656.10(d)(3). Where guidance issued via memorandum appears to conflict with regulations; the regulations control.

Congress declared that "no [labor] certification may be made unless the applicant for certification has, at the time of filing the application, provided notice of the filing" to its employees. Section 212 of the Act, n. 6. DOL found that "Congress' primary purpose in promulgating the notice requirement was to provide a way for interested parties to submit documentary evidence bearing on the application for certification." Final Rule for Applications for Permanent Employment Certification, 69 Fed. Reg. 77326, 77337-38 (Dec. 27, 2004). Thus, DOL's Board of Alien Labor Certification Appeals (BALCA) has held that filing notices must provide addresses of appropriate certifying officers (COs) to ensure that the officers receive evidence "directly" and "without delay." *Matter of Haw. Pac. U.*, 2009-PER-00127, slip op. at 13 (BALCA Mar. 2, 2010) (*en banc*).

Like USCIS, DOL states its acceptance of filing notices modeled after the sample. *See* DOL, "OFLC [Office of Foreign Labor Certification] Frequently Asked Questions and Answers," "Audit Q.5," https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited May 9, 2019). But DOL has denied labor certification applications with notices like the Petitioner's that list the website address referenced in the sample as the CO's only contact information.[3] BALCA has also affirmed such denials, finding that 20 C.F.R. § 656.10(d)(3)(iii) requires a filing notice to provide the CO's *mailing* address, not the address of a website listing the mailing address. *See, e.g., Florence Unified Sch. Dist.*, slip op. at 3. BALCA has held that the regulation and the text of the sample notice, read together, clearly instruct employers to use the referenced website to find the CO's mailing address and then to list the mailing address on the employers' notices. *See, e.g., Ace Homecare*, slip op. at 3-4.

Generally, we need not follow BALCA decisions. *See* 8 C.F.R. § 103.3(c) (stating that precedent decisions of the Attorney General, Board of Immigration Appeals, and USCIS bind Agency employees in the administration of the Act). But DOL promulgated the regulations at issue in this matter; we therefore find the regulatory interpretations of DOL to be persuasive. *See Chevron*

[3] *See, e.g., Matter of St. Jude Children's Research Hosp.*, 2014-PER-00979 (BALCA Aug. 21, 2018); *Matter of Bloomberg L.P.*, 2015-PER-00152 (BALCA Mar. 12, 2018); *Matter of Florence Unified Sch. Dist. #1*, 2015-PER-00524 (Feb. 27, 2018); *Matter of Hill Phoenix*, 2015-PER-00256 (BALCA Feb. 8, 2018); *Matter of Ace Homecare, LLC*, 2016-PER-00056 (BALCA Nov. 21, 2016).

U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984) (requiring deference to an agency's reasonable construction of a provision it administers). We will therefore defer to DOL's reasonable interpretations of the statutory delegation and the rules regarding filing notices. DOL reasonably interpreted Congressional intent in issuing the filing-notice requirement. Through BALCA, DOL also reasonably held that notices must contain the CO's mailing address. Consistent with Congressional intent, the listings of mailing addresses in notices will more likely result in the CO's direct receipt of evidence bearing on certification applications. We will therefore defer to DOL's interpretation of 20 C.F.R. § 656.10(d)(3)(iii) as requiring the CO's mailing address in filing notices.

On appeal, the Petitioner argues that the website address in its filing notice, although inoperative as of the petition's adjudication, might have been valid when the company previously posted the notice. As indicated above, however, we must defer to DOL's interpretation of its regulation. The Petitioner's notice therefore had to list the CO's mailing address. Even if we could accept a website address, the Petitioner has not demonstrated that the address in its notice was operational during the posting period. *See* section 291 of the Act, 8 U.S.C. § 1361 (stating that a petitioner bears the burden of proof). The Petitioner's argument is therefore unpersuasive.

Contrary to DOL's reasonable interpretation of the Act and regulation, the Petitioner's filing notice omitted the CO's mailing address. We will therefore affirm the denials of the labor certification application and the petition.

III. THE REQUIRED EXPERIENCE

Although unaddressed by the Director, the record also does not establish the Beneficiary's qualifying experience for the offered position. A petitioner must demonstrate a beneficiary's possession of all 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).[4] When evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification application to determine a position's minimum requirements. USCIS may neither ignore an application's term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983).

Here, the labor certification application states the minimum requirements of the offered position of unit manager as a U.S. master's degree or a foreign equivalent degree in nursing, and two years of experience "in the job offered." Part H.14 of the labor certification, "Specific skills and other requirements," also states that the position requires a "NY State Registered Nurse License."

Experience "in the job offered" means experience performing the primary duties of an offered position. *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. at 2 (BALCA Oct. 24, 2011). The labor certification states that the primary job duties of the offered position include: coordinating medical and health services in a unit; supervising and evaluating work of nurses and other personnel;

[4] This petition's priority date is February 9, 2018, the date of the petition's filing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

maintaining communication between medical staff and department heads; reviewing and analyzing unit activities; developing work schedules and staff assignments; monitoring resources to ensure their effective use; and developing and maintaining computerized record management systems. The Beneficiary's educational and licensure qualifications are not at issue.

On the labor certification application, the Beneficiary attested that, by the petition's priority date, he obtained more than two years of full-time experience as a nurse at a hospital in the Philippines. He stated that he worked at the hospital as a charge nurse from July 2014 through July 2016. He also stated that the same hospital employed him full-time as a "registered nurse/staff nurse" from November 2015 through July 2016.

Pursuant to 8 C.F.R. § 204.5(g)(1), the Petitioner provided an experience certificate from the Beneficiary's former employer to support the Beneficiary's claimed, qualifying experience. The certificate from the hospital's president/chief executive officer (CEO) states that the Beneficiary worked for more than two years as a charge nurse, beginning in July 2014. Unlike the labor certification application, however, the certificate does not indicate that, from November 2015 to July 2016, he concurrently served as a registered nurse/staff nurse. The record also does not explain why the certificate lists a different end date of employment (September 2017) than stated on the application. Moreover, contrary to 8 C.F.R. § 204.5(g)(1), the letter does not contain "a specific description of the duties performed by the alien." Thus, the letter does not meet regulatory requirements. The letter also does not establish the Beneficiary's performance of the primary duties of the offered position and therefore his possession of the requisite experience "in the job offered."

In any future filings in this matter, the Petitioner must submit additional evidence of the Beneficiary's claimed qualifying experience. The Petitioner must also explain the discrepancies between the letter and the Beneficiary's attestations on the labor certification application. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

IV. ABILITY TO PAY THE PROFFERED WAGE

Also unaddressed by the Director, the Petitioner has not established its ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful 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.* If a petitioner employs at least 100 workers, however, USCIS may accept a statement from a financial officer as proof of the petitioner's ability to pay. *Id.*

Here, the labor certification application states the proffered wage of the offered position of unit manager as $147,638 a year. As previously noted, the petition's priority date is February 9, 2018.

The Petitioner claims to employ 280 people and submitted a letter from its CEO as evidence of its ability to pay the proffered wage. The letter asserts the Petitioner's generation of more than $38 million in gross income in 2015 and its ability to pay the Beneficiary's proffered wage.

The CEO's letter, however, does not establish the Petitioner's ability to pay. First, the letter cites financial information that predates the petition's priority date by more than two years. Also, USCIS records indicate that the Petitioner filed an immigrant petition for another beneficiary that was approved as of this petition's priority date of February 9, 2018.[5] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and any other petitions that were pending or approved as of February 9, 2018, or filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[6] Because the Petitioner has another petition that was approved as of this petition's priority date and provided outdated financial information, the letter from its CEO does not demonstrate its ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2) (stating that USCIS "may accept" a statement from a financial officer as proof of ability to pay).

Thus, in any future filings in this matter, the Petitioner must submit copies of an annual report, federal tax returns, or audited financial statements for 2018, the year of the petition's priority date. The Petitioner must also provide the proffered wage and priority date of its other petition. The Petitioner may also submit evidence of its payments to the beneficiaries in 2018 or materials in support of the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

V. CONCLUSION

Contrary to DOL requirements, the Schedule A Petitioner did not properly notify its employees of the filing of the accompanying labor certification application. We will therefore affirm the denials of the certification application and the petition. A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of W-R-&H-C-C-*, ID# 4595403 (AAO Aug. 7, 2019)

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[5] USCIS records identify the other petition by the receipt number

[6] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew, or, unless on appeal, that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages after corresponding beneficiaries obtained lawful permanent resident status, or before priority dates of corresponding petitions.