U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11989019

Date: APR. 07, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a senior SAS programmer analyst under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner did not establish that a *bona fide* job offer of full-time permanent employment existed or that it intended to employ the Beneficiary in the offered position.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. 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 dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional 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. THE BONA FIDES OF THE JOB OFFER

A business may file a petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions specified in an accompanying labor certification. *Matter of Izdeska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis). A petitioner must establish this intent to employ a beneficiary in a *bona fide* position at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). USCIS must consider the merits of a petitioner's job offer to determine whether the job offer is realistic. *Matter of Great Wall*, 16 I&N Dec. 145 (Acting Reg'l Comm'r 1977). For labor certification purposes, the term "employment" means "[p]ermanent, full-time work." 20 C.F.R. § 656.3.

Here, the Petitioner filed the accompanying labor certification on March 25, 2019.[1] The labor certification and the petition indicate that the Petitioner is located in [redacted] New Jersey. On the labor certification, the Petitioner attested that it will permanently employ the Beneficiary in the full-time position of senior SAS programmer analyst at its own address. The labor certification describes the offered position as follows:

> Part H-11. Job duties:
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> Analyze clinical data for the respective datasets. Create Study Data Tabulation Models (SDTM) and Analysis Data Models (ADAM) based on Clinical Data Interchange Standards Consortium (CDISC) for the [redacted] of the trial data. Create tables, listings, and graphs for the client to support the outcome demonstrating the [redacted] Assist clients in reviewing documentation. Study data for submission to the [redacted] trials.
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> Part H-14. Specific skills or other requirements:
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> Travel/relocate to various unanticipated locations throughout the U.S. for long and short term assignments at client sites.

The record includes a prevailing wage determination (PWD) requested by the Petitioner pursuant to the provisions of 20 C.F.R. § 656.40. The PWD also lists the work location as the Petitioner's address and notes that travel to "various unanticipated locations through the U.S. for long and short term assignments at client sites" is required.

The Director noted that the Petitioner operates a computer consulting business but that it did not submit copies of agreements with potential clients where the Beneficiary will be placed. The Director issued a request for evidence (RFE), requesting that the Petitioner submit copies of agreements or contracts with all of its clients, with the Beneficiary, and between its clients and the Beneficiary. The Director

[1] The date DOL accepted the labor certification application for processing is the petition's priority date. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

noted that the submitted evidence must establish the location where work will be performed, the length of employment, and which entity will supervise, assign and control the Beneficiary's work.

In response to the Director's RFE, the Petitioner submitted a statement confirming its intention to employ the Beneficiary in the offered position at its headquarters and another work site, and to control the Beneficiary's work on a daily basis. The Petitioner also submitted a letter from its client, [redacted], identifying the Beneficiary as an employee of the Petitioner who will be assigned to work for its client, [redacted] located in [redacted], New Jersey.

The Director denied the petition, concluding that the record did not establish that the job offer was for a full-time permanent position.[2] The Director's conclusion was based on the following:

- The Petitioner indicated that the Beneficiary will work at various unanticipated client locations, but the record demonstrates that the Beneficiary will be assigned to only one client location with the end-client, [redacted] and through the Vendor, [redacted].
- The Work Order between the Petitioner and [redacted] lists the term of the assignment as three years, from July 2019 to July 2022.
- The Work Order reflects an agreement between only the Petitioner and the Vendor, and the record does not include evidence of any agreement between the Petitioner and the end-client, or the Vendor and the end-client.
- The Master Consulting Agreement between the Petitioner and [redacted] states that a background check (including drug screen, if necessary) on the Petitioner's personnel is required, but this requirement was not listed on the labor certification.
- The record does not establish that the Beneficiary will be employed on a permanent full-time basis.[3]

On appeal, the Petitioner asserts that the Director did not take into account other additional evidence submitted in response to the RFE to establish a *bona fide* job offer, but instead focused on limited contractual documentation. The Petitioner cites to its Employee Handbook, the Beneficiary's performance evaluation, an organizational chart, the Beneficiary's pay stubs and IRS Form W-2, Wage and Tax Statements, and evidence of benefits the Petitioner provides to its employees including health insurance, as establishing that it made a *bona fide* job offer to the Beneficiary.

With the appeal, the Petitioner submits evidence establishing that it paid for a Worker's Compensation and Unemployment Insurance program, the Beneficiary's recent pay stubs, and a letter from the Vendor [redacted] stating that, due to privacy standards, it does not "provide detailed end-client letters for *temporary* project consultants." (Emphasis added). The Petitioner asserts that the petition is a promise of future employment and "[USCIS] does not have the authority to request

[2] We note that, following the denial and appeal of this petition, the Petitioner obtained another labor certification from the DOL for a different position, that of software developer, and filed a second petition with the new underlying labor certification. That petition was approved on October 19, 2020.

[3] The record does not contain an agreement between the Petitioner and the end-client. It is also unclear whether the Petitioner will have the right to fire the Beneficiary and control the Beneficiary's work while working at the end-client's location, or that the Petitioner will remain the Beneficiary's employer.

Petitioner to establish existence of an employer/employee relationship or use it as a basis to deny the instant I-140 Petition."

While we agree that the petition represents future employment, the Petitioner must intend to employ the Beneficiary in the offered position as described in the labor certification on a permanent, full-time basis. Although the additional evidence cited by the Petitioner does support the Petitioner's assertion that it intends to employ the Beneficiary, the record does not establish the permanent, full-time nature of the position.

In his decision, the Director noted that the work order between the Petitioner and the Vendor lists the term of the agreement as three years and found that the Petitioner did not demonstrate its intention to employ the Beneficiary on a permanent, full-time basis. On appeal, counsel for the Petitioner asserts that "it is common in the I.T. industry for companies to issue work orders for the services of consultants for durations that are less than the full anticipated project length. ... Given the nature and complexity of the project at [redacted] Petitioner is confident that the need for Beneficiary's services may be extended." However, counsel's testimony that the Work Order may be extended is not sufficient to establish the permanent and full-time nature of the offered position. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

The Work Order and the letter from the Vendor submitted on appeal are inconsistent with the Petitioner's assertion that it intends to employ the Beneficiary on a permanent, full-time basis. The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). While the Work Order may have been executed based on an estimated schedule for completion, the record does not contain independent, objective evidence of the Petitioner's intent to employ the Beneficiary on a permanent, full-time basis for the position. *Id.* Instead, the record indicates that the project is temporary and estimated to be completed in three years. The record does not include a statement or explanation from the Petitioner, or other independent objective evidence to support counsel's assertions. Therefore, it is unclear whether the project may be extended and under what circumstances, or whether the Beneficiary may be assigned other work outside of the Work Order.[4] Termination of the project or cancellation of the work would end the full-time work certified in the labor certification. A petitioner must establish eligibility for a requested benefit as of a petition's filing and continuing throughout its adjudication. 8 C.F.R. § 103.2(b)(1).

Other evidence in the record casts further doubt on the Petitioner's assertion of the availability of permanent, full-time work for the Beneficiary. The offer of employment from the Petitioner to the Beneficiary lists only the Beneficiary's assignment to the end-client, with job duties specific to that project. The offer does not discuss the possibility of other, future assignments for the Beneficiary within the job duties of the labor certification, and as noted above, the Petitioner did not provide evidence of other assignments. Unresolved material inconsistencies may lead us to reevaluate the

[4] While we understand the importance of protecting confidential information and respect the Vendor's privacy standards, this does not absolve the Petitioner of its responsibility to provide independent, objective evidence to resolve inconsistencies. The Petitioner could have submitted a redacted Work Order, or relevant portions rather than the Work Order in its entirety, but it did not.

reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *See Matter of Ho*, 19 I&N Dec. at 591-592. The Petitioner also did not provide evidence that it had similar work involving the same job duties in-house or for another project upon completion of the end-client's current project.

The use of extensive industry-specific language in the job duties listed on the labor certification also casts doubt on the Petitioner's intent to employ the Beneficiary on a permanent and full-time basis, beyond the current assignment to the end-client.[5] The job duties as described on the labor certification indicate that the Beneficiary will develop programs to study and analyze data "for submission to the [redacted] trials." The duties also include, "Create Study Data Tabulation Models (SDTM) and Analysis Data Models (ADAM) based on Clinical Data Interchange Standards Consortium (CDISC) for the [redacted] Review of the trial data." The Petitioner has not established that, upon completion or termination of the end-client's current project, it intends to continue to employ, or is able to employ, the Beneficiary in the same position described on the labor certification.[6] It is unclear that the Petitioner has other such specific work related to the [redacted] industry to complete in-house to establish full-time work in the specific job duties listed in the certified labor certification.

It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). In view of the evidentiary deficiencies discussed above, we conclude that the Petitioner has not established that a *bona fide* job offer of permanent, full-time employment exists. Therefore, we will dismiss the appeal.

III. THE JOB REQUIREMENTS

In his decision, the Director found that the minimum requirements for the offered position were not accurately reflected on the labor certification as the labor certification did not list requirements for a background check or drug screening. The Petitioner does not address the job requirements of the offered position on appeal.

As the Director noted, the Master Consulting Agreements states as follows:

> The terms of any Work Order will be strictly subject at all times to the terms and conditions of this Agreement and is contingent upon a background check on the Consultant's Personnel, and drug screen if required by Sponsor. Such Work Order may be terminated by [redacted] immediate at any time based upon information received in the Background Report.[7]

[5] According to its website, the end-client, [redacted], is a biotechnology company with a focus on [redacted] development. *See* [redacted]

[6] On the labor certification, the Beneficiary states that he has been employed with the Petitioner in the position of SAS programmer since April 3, 2017. While the job details for that position are similar to the job duties of the offered position in developing programs to study and analyze data, the job duties of the Beneficiary's position since 2017 do not mention any specific regulatory body, such as [redacted], or a specific trial type, such as [redacted]

[7] The term "Sponsor" is defined in the Master Consulting Agreement as clients of [redacted]

Drug tests for offered positions generally constitute job requirements. *See, e.g., Matter of Honeywell Int'l, Inc.*, 2016-PER-00434, 2018 WL 3232449 *2 (BALCA June 27, 2018) (finding contingency on the successful completion of a background check and drug test to constitute a job requirement).[8] In this case, the Petitioner did not list any drug testing requirement on the labor certification. As the Petitioner does not discuss this issue, we consider the issue of whether the minimum requirements were accurately reflected on the labor certification abandoned or waived on appeal. [9]

Based on the foregoing, we dismiss the appeal because the Petitioner did not establish that a *bona fide* job offer of permanent, full-time employment exists, or that it intends to employ the Beneficiary under the terms and conditions specified in the accompanying labor certification. Because the Petitioner does not address it on appeal, we also affirm the Director's finding that the minimum requirements for the offered position were not accurately reflected on the labor certification. The Petitioner has not established eligibility for the requested benefit as of the petition's filing and continuing throughout its adjudication as required by 8 C.F.R. § 103.2(b)(1).

ORDER: The appeal is dismissed.

[8] Decisions of the Board of Alien Labor Certification Appeals (BALCA) do not bind USCIS. *See* 8 C.F.R. § 103.9(b) (stating that, in Department of Homeland Security (DHS) proceedings involving the same issues, precedent decisions of the Attorney General and the Board of Immigration Appeals bind DHS officers). But USCIS defers to DOL's reasonable interpretations of its labor certification regulations. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) (requiring one administrative agency to defer to another's reasonable interpretation of regulations that Congress authorized it to promulgate and enforce).

[9] *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (when a respondent fails to substantially appeal an issue addressed in a decision, that issue is waived on appeal); *see also Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009) (generally finding that a waived ground of ineligibility may form the sole basis for a dismissed appeal); *Matter of Zhang*, 27 I&N Dec. 569 n.2 (BIA 2019) (finding that an issue not appealed is deemed as abandoned).