U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-N-T-, LLC

DATE: JAN. 9, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a parent company of restaurants, seeks to employ the Beneficiary as a first-line restaurant supervisor. It requests her classification under the third-preference, immigrant category as a skilled worker. 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" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition. The Director concluded that, because the Petitioner indicates that the Beneficiary would continue to work for one of its subsidiaries, it did not demonstrate its required intention to employ her in the offered position. The Director also found that the Petitioner did not establish its required ability to pay the position's proffered wage, or the Beneficiary's qualifying experience for the offered position and the requested classification.

On appeal, the Petitioner submits additional evidence and contends that, as the subsidiary's parent company, it qualifies as the Beneficiary's intended employer. It also asserts its ability to pay the proffered wage and the Beneficiary's qualifications for the position and the requested classification.

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

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker 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)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, an employer must next submit the labor certification 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 DOL-certified job requirements of a position and criteria for the requested classification. Finally, if

USCIS grants a petition, a foreign national 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. INTENTION TO EMPLOY IN THE OFFERED POSITION

To petition for a worker, a business must be "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must further intend to employ a beneficiary under the terms of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a denial where, contrary to the terms of the labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis). For labor certification purposes, the term "employment" means "[p]ermanent, full-time work." 20 C.F.R. § 656.3. A labor certification "employer" must also have a valid federal employer identification number (FEIN). *Id.*

Here, the labor certification indicates the Petitioner's intention to permanently employ the Beneficiary in the full-time position of first-line restaurant supervisor. The record, however, neither demonstrates the Petitioner's operation of a restaurant, nor its plans to run one. Also, the amended tax returns of its executive manager/sole member indicate that the petitioning limited liability company (LLC) does not generate revenues, pay wages, or incur expenses.[1] Rather, the record indicates that the Petitioner functions as a holding company, owning two other LLCs that operate restaurants. One of the subsidiary LLCs, which has a different FEIN than the Petitioner, has employed the Beneficiary since 2011 and, according to the Petitioner, would continue to do so upon this petition's approval. The Petitioner and the subsidiary LLC that employs the Beneficiary are entities separate from each other and their owners. *See* 31 Me. Rev. Stat. § 1504(1) (stating that a Maine LLC "is an entity distinct from its members"). They possess different FEINs, and are treated as separate entities under Federal Law governing employment taxes. *See* 26 C.F.R. § 301.7701-2; *see also* IRS, Single Member Limited Liability Companies, https://www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies (last visited Jan. 2, 2019). The record therefore indicates that the subsidiary LLC, as a separate and distinct legal entity from the Petitioner, intends to employ the Beneficiary.

On appeal, the Petitioner argues that neither DOL regulations nor guidance expressly bar a company from filing a labor certification application for a foreign national that its subsidiary would employ. However, as noted, the DOL definition of "employer" hinges on a business's possession of its own, valid FEIN. *See* 20 C.F.R. § 656.3 (stating that "[a]n employer must possess a valid . . . (FEIN)").[2] The DOL places great importance on verifying the identities of labor certification employers and relies on FEINs in this process. The DOL informs employers registering for the system used to

[1] The owner of a single-member LLC may list the entity's income on Schedule C, Profit or Loss From Business, with his or her IRS Form 1040, U.S. Individual Income Tax Return. *See* 26 U.S.C. §§ 301.7701.3(a), (b) (explaining default classification of "disregarded entities").

[2] For purposes of determining whether a foreign national gained qualifying experience with a labor certification employer, DOL regulations define the same employer as having the same FEIN. 20 C.F.R. § 656.17(i)(5)(i).

process labor certification applications that the agency screens and verifies the entities' business information. To register, each entity must list its FEIN, which DOL uses to verify whether the employer-applicant is a *bona fide* business entity. Final Labor Certification Rule for the Permanent Employment of Aliens in the United States, 69 Fed. Reg. 77326, 77329 (Dec. 27, 2004); *see also Matter of Cohen*, 2012-PER-00919, 2015 WL 171888 (BALCA Jan. 8, 2015) (allowing the DOL to request proof of a labor certification employer's FEIN, including documentation from the Internal Revenue Service (IRS) or a financial institution, and tax returns with pre-printed labels or tax coupons).[3] Allowing a parent company to sponsor a subsidiary's employee would undermine the integrity of the labor certification registration process. Further, the Board of Alien Labor Certification Appeals (BALCA) has held that the definition of "employer" under 20 C.F.R. § 656.3 bars an employer's use of an FEIN of a related entity or agent. *See Matter of Susan M. Jeannette,* 2011-PER-02930, (BALCA Mar. 1, 2013); *see also Matter of Pacific Molding, Inc.*, 2008-PER-00042, (BALCA June 12, 2008).

Additionally, following the Petitioner's argument that it may substitute for the Beneficiary's prospective employer would undercut the regulations' anti-fraud provisions. When issuing the final labor certification regulations, the DOL agreed with commenters that "fraud is a serious problem" and vowed "to aggressively pursue means by which to identify those applications that may be fraudulently filed." Final Labor Certification Rule for the Permanent Employment of Aliens in the United States, 69 Fed. Reg. at 77329. If parent companies could sponsor their subsidiaries' employees, however, subsidiaries lacking FEINs, or with FEINs different than their parents', would evade the anti-fraud, verification process. Given the DOL's stated concern about fraudulent labor certification applications, the regulatory history does not support the agency's intention to allow businesses to evade FEIN verification. Thus, the evidence does not support the Petitioner's assertion that DOL regulations and guidance allow parent companies to file labor certification applications for their subsidiaries' employees.

Also, petitioners must submit approved labor certifications to USCIS with their petitions. The Act explicitly states that petitioners must be "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. As noted, the Petitioner has not demonstrated that, as a legal entity separate from its subsidiary, it intends to employ the Beneficiary. On appeal, the Petitioner argues that, if a parent company has authority to affect employment of its subsidiary's workers, it also employs those workers. It cites a precedent decision of the United States Court of Appeals for the First Circuit, which has jurisdiction over the intended geographical area of employment in this matter. *See Carnero v. Boston Sci. Corp.*, 433 F.3d 1, 6 (1st Cir. 2006) (citation omitted). In *Carnero*, the First Circuit assumed for purposes of its decision that, under a federal whistleblower protection statute, an employee of foreign subsidiaries was also an "employee" of their publicly-traded, U.S. parent company. *Carnero*, 433 F.3d at 6. There, regulations defined the term "employee" as someone "presently or formerly working for a [publicly-

[3] While we are not bound by BALCA decisions, we may nevertheless take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

traded] company *or company representative*." *Id.* (emphasis added). Regulations further defined "company representative" as a "contractor . . . or *agent of a company*." *Id.* (citation omitted) (emphasis added). The court therefore found it "quite possible" that the foreign subsidiaries were agents of the U.S. parent, qualifying their foreign worker under the statute as the parent's "employee." *Id.*

Carnero, however, does not bind us in this matter. First, the First Circuit assumed - but did not *hold* - that the subsidiaries' worker was an employee of the parent company. Where courts assume propositions in deciding other legal issues, the assumptions "are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted). Second, *Carnero* involved a federal whistleblower statute unrelated to the Act. The case is therefore inapplicable to these proceedings. Third, relevant regulations in *Carnero* indicated that the statutory term "employee" included an employee of a subsidiary. Here, the Petitioner does not cite similar regulations indicating that a parent company can file a petition or labor certification application for an employee of its subsidiary. The record therefore does not support the Petitioner's argument that we should consider it the Beneficiary's current and prospective employer. For the foregoing reasons, the record does not establish the Petitioner's intention to permanently employ the Beneficiary in the offered position. We will therefore affirm the Director's decision.

III. ABILITY TO PAY THE PROFFERED WAGE

The Director also found that the record did not demonstrate the Petitioner's ability to pay the proffered wage. "Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage." 8 C.F.R. § 204.5(g)(2). However, as discussed in section II, the Petitioner indicates that its subsidiary intends to employ the Beneficiary in the offered position. Thus, contrary to 8 C.F.R. § 204.5(g)(2), the Petitioner is not "the prospective United States employer." We therefore need not consider its ability to pay the proffered wage and will reserve this issue.

IV. THE REQUIRED EXPERIENCE

As previously indicated, a skilled worker must have at least two years of training or experience. Section 203(a)(3)(A)(i) of the Act. A beneficiary must also possess 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). Here, the accompanying labor certification states the minimum requirements of the offered position of first-line restaurant supervisor as a U.S. high school diploma or an equivalent foreign credential, and two years of experience "in the job offered." The petition's priority date is July 21, 2015, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). The Beneficiary's educational qualifications are not at issue.

The Beneficiary attested on the labor certification that, before the petition's priority date, she gained more than nine years of full-time, qualifying experience. She stated that she worked as a manager/supervisor at a restaurant in Ireland from November 1998 to May 2008. Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner provided a letter from the Beneficiary's claimed former employer in support of her experience. The letter bears the signature of the Beneficiary's spouse, identifying him as "owner" of the restaurant that purportedly employed her in Ireland. As the Petitioner concedes, the Beneficiary's spouse is also its executive manager/sole member.

The Director found the letter insufficient to establish the Beneficiary's qualifying experience. The Director determined that, contrary to regulations, the letter omits the signatory's address and does not indicate the Beneficiary's possession of at least two years of experience "in the job offered." Also, the Director cited discrepancies in the Beneficiary's employment history. Contrary to her attestation on the labor certification, the Beneficiary stated on a 2009 application for a U.S. nonimmigrant visa that she was the "owner" of her former employer in Ireland, rather than a manager/supervisor.

The Petitioner argues on appeal that the record does not support the Director's determinations regarding the letter. However, the Director correctly found under 8 C.F.R. § 204.5(l)(3)(ii)(A) that the letter lacked the employer's address. Moreover, given the noted discrepancies in the record, the Petitioner must submit independent, objective evidence of the claimed experience. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). But as the Beneficiary's spouse and the Petitioner's executive manager/sole member, the signatory of the employment verification letter has a vested interest in this petition's approval. *See, e.g.*, section 203(d) of the Act (entitling a spouse of an employment-based immigrant to the same status and priority date as the prospective worker). Thus, the letter constitutes biased, unreliable evidence of the Beneficiary's experience. The record lacks independent, objective evidence - such as government or tax records, or contemporaneous business documents - corroborating the restaurant's ownership by the Beneficiary's spouse and the eatery's employment of the Beneficiary as a manager/supervisor.

The Petitioner also asserts that the Director incorrectly doubted the Beneficiary's qualifying experience based on "perceived discrepancies" in her employment history. Counsel contends that the Beneficiary served as both an owner and manager/supervisor of the restaurant in Ireland. But the record does not establish her purported dual role or indicate how much time she devoted to each role. Counsel's assertion does 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)). The Petitioner must substantiate counsel's statement with independent proof. Given the inconsistencies in the Beneficiary's previously reported work history and her relationship to the letter's signatory, the letter is insufficient to demonstrate the Beneficiary's qualifying experience *See Matter of Ho*, 19 I&N Dec. at 591. The Petitioner has not otherwise submitted evidence to corroborate the claimed experience.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position and the requested classification.

V. CONCLUSION

The record on appeal does not establish the Petitioner's intention to employ the Beneficiary in the offered position. The record also does not demonstrate the Beneficiary's qualifying experience for the offered position or the requested classification.

ORDER: The appeal is dismissed.

Cite as *Matter of C-N-T-, LLC*, ID# 2106187 (AAO Jan. 9, 2019)