U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27917928

Date: MAR. 08, 2024

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (H-2A)

The Petitioner, a farm labor contractor, seeks to temporarily employ the 17 Beneficiaries as farm laborers/workers under the H-2A nonimmigrant classification for agricultural labor or services. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(ii)(a), 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Under the H-2A program, a qualified U.S. employer may bring certain noncitizens to the United States to fill temporary or seasonal agricultural jobs for which U.S. workers are not available.

The Director of the California Service Center denied the petition, concluding that the Petitioner did not establish that the temporary agricultural labor certification submitted with the petition, which is for 47 workers, had places remaining for the 17 Beneficiaries requested at the time of adjudication. The Director further noted the Petitioner did not comply with H-2A regulations pertaining to the substitution of beneficiaries at 8 C.F.R. § 214.2(h)(5)(vi) and (ix). The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To qualify for H-2A classification, the petitioner must, among meeting other requirements, offer a job that is of a temporary or seasonal nature, and must submit a single, valid temporary labor certification from the U.S. Department of Labor (DOL) establishing that there are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work, and that employing H-2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. *See* section 101(a)(15)(H)(ii)(a) and section 218(a) of the Act, 8 U.S.C. § 1188(a).

The implementing regulations provide that the total number of beneficiaries on a petition or series of petitions based on the same temporary labor certification may not exceed the number of workers indicated on that document. 8 C.F.R. § 214.2(h)(5)(i)(B).

II. ANALYSIS

The primary issue we will address is whether the record establishes that the Petitioner's request for 17 Beneficiaries exceeds the number of workers on the temporary labor certification submitted with this petition.

A. Procedural History

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 16, 2022, with a temporary agricultural labor certification (TLC [redacted]) approved by DOL on May 5, 2022. The temporary labor certification was approved for 47 farm laborer/worker positions, with a stated period of need from June 15, 2022, through November 15, 2022.

In a statement accompanying the petition, the Petitioner requested an amendment and extension of stay for the 17 named Beneficiaries, who were current H-2A employees of the Petitioner working under a different approved temporary labor certification. The record reflects that all 47 places on the temporary labor certification were available at the time of filing and therefore none of the Beneficiaries were intended to be replacements for other H-2A workers as provided for under 8 C.F.R. § 214.2(h)(5)(ix).

On October 24, 2022, the Director issued a notice of intent to deny (NOID). In the NOID, the Director observed that, according to USCIS records, the Petitioner filed six additional H-2A classification petitions using TLC [redacted] while the instant petition was pending.[1] The NOID therefore advised that "it appears that you no longer have availability of slots under the TLC." The Director provided the receipt numbers of four approved petitions (filed between June and August 2022) whose beneficiaries received 36 of the 47 places on the temporary labor certification, and noted that two additional petitions, each requesting 10 workers, were pending when the NOID was issued.[2]

Citing to the regulation at 8 C.F.R. § 214.2(h)(5)(ix), the Director advised the Petitioner that if it wished to continue with the petition, it must establish that there are enough available workers slots by providing: (1) copies of the approval notices covering all the workers for which replacements are sought; (2) a statement giving each terminated worker's name, country and date of birth, termination date, the reason for termination, and the date that USCIS was notified that the worker was terminated or absconded; and other evidence required under 8 C.F.R. § 214.2(h)(5)(i)(D).

In a response received on December 8, 2022, the Petitioner maintained that it still had space remaining for the 17 requested Beneficiaries because USCIS had approved several petitions that transferred workers from TLC [redacted] to other valid temporary labor certifications. It provided the following information related to these petitions, indicating a total of 23 spaces had been opened:

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[1] The Director had previously issued a request for evidence (RFE) on July 18, 2022, advising the Petitioner it would need to document that certain Beneficiaries (seven of the seventeen included on the petition) had spent an uninterrupted period of at least 90 days outside the United States in the three years preceding the filing of the petition. The Petitioner submitted a timely and satisfactory response to the RFE.

[2] The approved petitions the Director identified included: [redacted] (10 workers); [redacted] (40 workers with only 10 visas issued); [redacted] (13 workers); and [redacted] (3 workers). The two pending petitions mentioned in the NOID were [redacted] and [redacted] (both filed August 27, 2022).

- [redacted] – This petition was filed on June 23, 2022, approved on July 15, 2022, and transferred ten H-2A workers from [redacted]
- [redacted] – This petition was filed on July 7, 2022, approved on July 13, 2022, and transferred ten additional H-2A workers from [redacted]
- [redacted] – This petition was filed on August 16, 2022, approved on August 23, 2022, and transferred three additional H-2A workers from [redacted]

The Petitioner provided a timeline that included the instant petition, five subsequent petitions requesting workers under the same temporary labor certification, and the petitions listed above.[3] The Petitioner explained the number of places remaining after each filing, and concluded that if all petitions (including the instant petition) were approved, there would be seven places remaining on [redacted]

The Petitioner did not directly address the Director's request for documentation relating to the substitution of beneficiaries under 8 C.F.R. § 214.2(h)(5)(vi) and (ix). The Petitioner emphasized that "the number of [workers] did not at any instance exceed the number of positions certified for the instant TLC," thereby suggesting that none of the beneficiaries of this petition or other petitions were intended to serve as replacements for other H-2A workers.

In the decision denying the petition, the Director acknowledged the Petitioner's response to the NOID and reached the following conclusions:

- The Petitioner did not provide evidence of visa availability under TLC [redacted] as it stated in its response to the NOID that it has only 7 open spots, which is insufficient visa availability for this filing because the Petitioner requested 17 workers.
- This petition "does not contain a letter of withdrawal and/or substitution for the beneficiaries transferred in from TLC [redacted]
- It appears that the Petitioner "violated INA regulations in several of the filings listed" because it did not provide the necessary documentation or letter of withdrawal/substitution, which is required under 8 C.F.R. § 214.2(h)(5)(vi) and 8 C.F.R. § 214.2(h)(5)(ix).

The Director also emphasized that the Petitioner's timeline of filings did not include [redacted] (filed on August 27, 2022) and [redacted] (filed on October 24, 2022) which requested additional workers under [redacted] The Director concluded that the Petitioner had "over-utilized this temporary labor certification."

On appeal, the Petitioner asserts that the Director erroneously concluded that there were insufficient open spots on the temporary labor certification to support the approval of this petition. The Petitioner maintains that the Director "misread the conclusion" it reached in summarizing the prior filings in its NOID response. Specifically, the Petitioner emphasizes that, in responding to the NOID, it explained

[3] We note that the Petitioner's timeline and calculations did not include [redacted] which the Director mentioned in the NOID and remained pending at the time of the NOID response. That petition requested that ten workers be granted an amendment and extension of H-2A status under TLC [redacted]

that it would have seven places remaining even after the requested approval of this petition for 17 workers.

In addition, the Petitioner asserts that the Director "erroneously interpreted the INA regulations regarding the transfer in and out of workers," erroneously concluded that it failed to provide necessary documentation in support of the petition, and erroneously concluded that it "violated INA regulations in other filings referenced in the denial notice."

B. Basis for Remand

Upon review, and for the reasons discussed below, we will withdraw the Director's decision and remand this matter for further evaluation and entry of a new decision.

As noted, the Petitioner argues that it explained in its response to the NOID that it would have seven spaces remaining for H-2A workers under [redacted] even if USCIS ultimately approved this petition requesting 17 workers. We agree with the Petitioner's contention that the Director misinterpreted its explanation and incorrectly concluded that the Petitioner expressly stated that it had only seven spots remaining at the time of adjudication. Further, it appears that the Director based the decision, in part, on this misreading of the Petitioner's statement, rather than conducting an independent evaluation of the number of spaces remaining based on all available information.

In addition, USCIS records indicate that three additional petitions, all requesting H-2A workers under [redacted] remained pending at the time the Director issued the NOID and final decision, and were ultimately approved while this appeal was pending:

- [redacted] (filed August 27, 2022 and approved May 1, 2023)
- [redacted] (filed August 27, 2022 and partially approved July 13, 2023)
- [redacted] (filed October 24, 2022 and approved May 9, 2023)

As the approval of these petitions may have a direct bearing on the disposition of the petition before us on appeal, we find it appropriate to remand the matter to the Director to consider the implications of these approvals in the first instance. Prior to the issuance of a new decision, the Director is instructed to issue a new NOID and allow the Petitioner an opportunity to submit any relevant information that has a bearing on the number of spaces available for workers. This may include information related to any additional petitions filed in 2022 for the purpose of transferring employees from [redacted] to another temporary labor certification.

We also observe that although the instant petition was filed with a request for 17 Beneficiaries on June 16, 2022, USCIS records indicate that on June 23, 2022, the Petitioner filed a petition [redacted] requesting that 10 of these 17 workers be transferred to a different temporary labor certification, and that petition was approved. As the matter will be remanded, the Director should request that the Petitioner clarify its intentions with respect to those ten workers, as their transfer to another labor certification may impact the total number of spaces needed under [redacted]

Finally, the Director did not provide a sufficient explanation for their conclusion that the Petitioner had violated regulatory requirements pertaining to substitution of beneficiaries. This petition, as filed,

did not indicate that the Beneficiaries would be replacing previously approved H-2A workers under the same temporary labor certification under the substitution provision at 8 C.F.R. § 214.2(h)(5)(ix). If the Director's new decision will include a determination that the Petitioner violated this regulation, this issue should be addressed in a new NOID and the decision shall discuss the specific reasons for denial on this basis, in accordance with 8 C.F.R. § 103.3(a)(1). In addition, the Director's determination that the Petitioner may have violated 8 C.F.R. § 214.2(h)(5)(ix) in separate petition filings was not relevant to this adjudication and cannot serve as a basis for denial of this petition.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further evaluation of eligibility under 8 C.F.R. § 214.2(h)(5)(i)(B). The Director is instructed to issue a new NOID in accordance with the requirements of 8 C.F.R. § 103.2(b)(8) and 103.2(b)(16)(i). Following the Petitioner's response to the NOID, or the expiration of the time period to respond, the Director shall issue a new decision.

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