U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30292520

Date: APR. 05, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Professional)

The Petitioner, a provider of physical therapy services, seeks to employ the Beneficiary as a physical therapist. It requests her classification as a professional worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, which also sought the position's designation as a physical therapist under Schedule A.[1] The Director concluded that, although the Petitioner documented that it provided its employees with notice of filing the labor certification application as required by U.S. Department of Labor (DOL) regulations, the Petitioner's notice did not comply with all regulatory requirements. 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.

A Schedule A application must include evidence that notice of filing the labor certification application was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.10(d). *See* 20 C.F.R. § 656.15(b)(2). Specifically, when an employer offers a non-unionized position to a noncitizen, it must document that it posted notice of the application's filing to employees

[1] A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which DOL has determined that there are not sufficient U.S. workers who are able, willing, qualified, and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals in such occupations. Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the Form I-140, Immigration Petition for Alien Workers, with USCIS. Instead, the petition is filed directly with USCIS with a duplicate uncertified labor certification, and USCIS makes a determination on both the petition and the accompanying labor certification application. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

at the proposed worksite for at least 10 consecutive business days. 20 C.F.R. § 656.10(d)(l)(ii).[2] The notice must: indicate that the posting stems from the filing of a labor certification application for the offered position; state that anyone may send documentary evidence about the application to the DOL certifying officer; provide the address of the appropriate DOL certifying officer; and be posted between 30 and 180 days before the application's filing. 20 C.F.R. § 656.10(d)(3). A notice of filing in a Schedule A case must also describe the job and rate of pay. 20 C.F.R. § 656.10(d)(6).

Upon review, we conclude that the Petitioner satisfied the notice of filing requirements at 20 C.F.R. § 656.10(d). Although the Petitioner has overcome the sole grounds for denial, the record as presently constituted contains insufficient evidence of its ability to pay the Beneficiary's proffered wage. Accordingly, we will withdraw the decision and remand the matter to the Director.

A petitioner must demonstrate its continuing ability to pay an offered job's proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Initial evidence of ability to pay must generally include copies of an annual report, federal tax return, or audited financial statements for each available year, from the year of the priority date onward. *Id.*; *see generally* 6 *USCIS Policy Manual* E.4(A), www.uscis.gov/policy-manual. If a petitioner employs 100 or more workers, a statement from a financial officer of the organization may serve to establish ability to pay the proffered wage. *Id.*

When determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage, beginning with the year of a petition's priority date. *See generally* 6 *USCIS Policy Manual*, *supra*, at E.4(C)(l). If a petitioner did not pay a beneficiary the full proffered wage or did not pay a beneficiary at all during the relevant period, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. *Id.* If net income and net current assets are insufficient, the Agency may consider other factors potentially affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[3]

The petition's priority date is April 28, 2023, the date the Petitioner filed the Form I-140 and Schedule A application with USCIS. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). As evidence of its ability to pay, the Petitioner provided a copy of its 2021 federal income tax return. This evidence does not establish the Petitioner's ability to pay the proffered wage as of the priority date.

Because the initial required evidence of the Petitioner's ability to pay as of the petition's priority date should now be available, we will remand the matter. On remand, the Director should ask the Petitioner to submit copies of its annual reports, federal tax returns, or audited financial statements for 2023. The company may also submit additional evidence of its ability to pay, including proof of its employment of the Beneficiary since the priority date or materials supporting factors stated in *Sonegawa*. If the Petitioner has filed Form I-140 on behalf of other beneficiaries, the Director should

[2] If an offered position is unionized, the 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).

[3] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, Inc. v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

determine whether this case necessitates analysis of the Petitioner's ability to pay multiple beneficiaries and may request additional supporting evidence. *See generally* 6 *USCIS Policy Manual*, *supra*, at 4.D(2).

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