U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-B-

DATE: APR. 18, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a working mother, seeks to employ the Beneficiary as a child monitor. She requests the Beneficiary's classification under the third-preference, immigrant category as an "other worker." Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This category allows a U.S. employer to sponsor an unskilled worker to obtain lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the required ability to pay the proffered wage.

On appeal, the Petitioner submits additional evidence and asserts her possession of sufficient assets to pay the wage.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further proceedings consistent with the following opinion.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. First, to permanently fill an offered position in the United States with a foreign national, an employer must obtain a labor 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). If the DOL certifies an offered 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. If USCIS approves a 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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate her continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence.[1] 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

Because the Petitioner is an individual, we consider her personal income, assets, and liabilities in determining her ability to pay the proffered wage. In addition to covering the proffered wage, she must demonstrate an ability to support herself and any dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983) (holding that an individual did not establish an ability to both pay the proffered wage and support himself and his family).

Here, the accompanying labor certification states the proffered wage of the offered position of child monitor as $8.47 an hour, or $17,617.60 a year for a 40-hour work week. The Director found that the Petitioner established her ability to pay the proffered wage in 2006, but not in 2005, the year of the petition's priority date. The Director noted that the proffered wage and the Petitioner's household expenses in 2005 totaled $82,702.60. A copy of the Petitioner's federal income tax for that year stated her adjusted gross income (AGI) as $32,557. The record also established her possession, as of December 2005, of $32,052.15 in a bank account. The combined amount of AGI and bank funds, however, did not equal or exceed the sum of the proffered wage and expenses.

On appeal, the Petitioner submits evidence of additional assets available to her in 2005. The materials indicate that, as of that year's end, she had $22,316.24 in an individual retirement account (IRA). Even if subject to a 10-percent penalty for early withdrawal, *see* 26 U.S.C. § 72(t), the IRA funds would cover the additional $18,093.45 needed to meet the sum of the proffered wages and expenses. The record on appeal therefore demonstrates the Petitioner's ability to pay the proffered wage in 2005.

As previously indicated, however, a petitioner must demonstrate her continuing ability to pay a proffered wage until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The record here lacks required evidence of the Petitioner's ability to pay the proffered wage beyond 2006. We will therefore remand this matter for further consideration.

On remand, the Director should ask the Petitioner to submit copies of annual reports, federal income tax returns, or audited financial statements for 2007 and following years, and afford her a reasonable opportunity to respond. The Petitioner may also submit additional evidence of her ability to pay during the relevant years.

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[1] This petition's priority date is March 2, 2005, the date an office within the DOL's employment service system accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

III. LABOR CERTIFICATION SUBSTITUTION

Although unaddressed by the Director, the record also does not establish the substitution of the Beneficiary into the accompanying labor certification.

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an unskilled worker must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). A petitioner seeking to substitute another foreign national for the one listed on a labor certification must submit a new Form ETA 750, Part B, signed by the substitute and detailing his or her qualifications for the offered position. USCIS *Adjudicator's Field Manual*, Ch. 22.2(b)(6), https://www.uscis.gov/sites/default/files/ ocomm/ilink/0-0-0-6423.html (last visited Mar. 12, 2018).

Here, the Petitioner seeks to substitute the Beneficiary for the foreign national listed on the accompanying labor certification.[2] The Petitioner, however, did not submit a new Form ETA 750, Part B, signed by the Beneficiary and detailing her qualifications for the offered position of child monitor. The Petitioner therefore has not met the requirements for the Beneficiary's substitution into the labor certification.

On remand, the Director should ask the Petitioner to submit the required, completed form before considering the Beneficiary's substitution into the accompanying labor certification.

IV. INTENT TO EMPLOY IN THE OFFERED POSITION

The record also does not establish the Petitioner's continuing intention to employ the Beneficiary in the offered position.

An employer may file a petition if she 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 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 an accompanying labor certification, a petitioner no longer intended to employ a beneficiary as a domestic worker on a full-time, live-in basis).

Here, the accompanying labor certification states the Petitioner's intention to employ the Beneficiary as a child monitor, caring for the Petitioner's two children "aged 11 and 6." Based on the 13 years that have passed since the labor certification's filing, however, the Petitioner's children are now about 24 and 19, both over the age of majority in most U.S. states. The labor certification indicates that one of the children has "special needs." But, considering the current ages of the Petitioner's

[2] The Petitioner asked to substitute the Beneficiary into the labor certification before the DOL prohibited such requests. *See* 20 C.F.R. § 656.11(a) (barring labor certification substitution requests after July 16, 2007).

children, the record does not establish her continuing intention to employ the Beneficiary in the offered position.

On remand, the Director should ask the Petitioner to submit additional evidence of her intention to employ the Beneficiary in the offered position and afford her a reasonable opportunity to respond. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

V. CONCLUSION

The Petitioner has demonstrated her ability to pay the proffered wage in 2005 and 2006. But the record lacks required evidence of her continuing ability to pay in following years. The record also lacks evidence of the Beneficiary's substitution into the labor certification and does not demonstrate the Petitioner's continued intent to employ the Beneficiary in the proffered position.

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

Cite as *Matter of N-B-*, ID# 1142307 (AAO Apr. 18, 2018)