U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30375352

Date: APR. 25, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a junior golf academy offering athletic training and educational services, seeks to employ the Beneficiary as a business development specialist. 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 Texas Service Center denied the petition, concluding the record did not establish the Petitioner's ability to pay the proffered wage. The Petitioner subsequently filed combined motions to reopen and reconsider, which the Director dismissed. 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.

Any petition filed for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective U.S. employer has the ability to pay the proffered wage. A petitioner must demonstrate this ability from the petition's priority date until a beneficiary obtains permanent residence. 8 C.F.R. § 204.5(g)(2). Initial evidence 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.

When determining ability to pay, U.S. Citizenship and Immigration Services (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* E.(4)(C)(1). 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).[1]

The record indicates that the proffered annual wage for the position of business development specialist is $60,000. The petition's priority date is June 14, 2021, the date the U.S. Department of Labor accepted the Petitioner's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner has consistently claimed that it has paid the Beneficiary at a salary equal to or greater than the proffered wage since June 2021, but did not initially submit copies of its federal income tax return, audited financial statements, or annual report as required under 8 C.F.R. § 204.5(g)(2). Instead, it provided copies of the Beneficiary's pay vouchers and evidence that she is authorized to work for the Petitioner in H-1B nonimmigrant status.

In a request for evidence (RFE) issued in April 2022, the Petitioner was notified that insufficient evidence was initially submitted to establish its ability to pay the proffered wage. Although the Petitioner responded to the RFE in June 2022 with additional documentation intended to establish that it had been paying the Beneficiary the proffered wage, the Director concluded that the documentation provided was not sufficient because it did not include, as requested, the Petitioner's income tax returns, audited financial statements, or annual report. The Director, citing 8 C.F.R. § 103.2(b)(2)(i), declined to consider other "secondary" evidence of the Petitioner's ability to pay in the absence of this required initial evidence, noting that the Petitioner did not explain why it could not obtain the evidence required by 8 C.F.R. § 204.5(g)(2) or establish that this evidence was unavailable.

The record reflects that the Petitioner provided copies of both its 2020 and 2021 federal income tax returns in support of its combined motions to reopen and reconsider.[2] In the decision dismissing the motions, the Director did not acknowledge the Petitioner's submission of this evidence in support of its motion to reopen. On appeal, the Petitioner resubmits copies of these tax returns and contends that it established its ability to pay based on evidence that it has been paying the Beneficiary a salary equal to or greater than the proffered wage of $60,000 since the priority date.

The Director has not yet reviewed the Petitioner's tax returns and other relevant evidence it submitted to demonstrate that it has been paying the Beneficiary the proffered wage since the priority date. We conclude the Director is the more appropriate party to consider the impact of this evidence on the Petitioner's eligibility for the benefit sought in the first instance. Accordingly, we will withdraw the Director's decision and remand the matter for further consideration and entry of a new decision.

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[1] 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-44 (S.D. Cal. 2015).

[2] Based on this petition's June 2021 priority date, the earliest relevant tax return for purposes of evaluating the Petitioner's ability to pay is its 2021 tax return. The record indicates that the Petitioner was not required to file its 2021 tax return until on or before September 15, 2022. Therefore, it appears this evidence was unavailable at the time the Petitioner responded to the Director's RFE.

We observe that while the Petitioner has consistently emphasized that it employs the Beneficiary in H-1B nonimmigrant status and states it has continuously paid her the proffered wage, the submitted pay vouchers indicate they were issued to the Beneficiary by "Premier Corporate Professional" rather than by the petitioning company. The Petitioner did not provide an explanation or supporting documentation demonstrating its relationship with this entity, and as noted, neither of the Director's decisions indicate that they previously reviewed the payroll documentation for sufficiency. Additional explanation and evidence will be required to support the Petitioner's claim that it has paid the Beneficiary the full proffered wage, beginning with the year of the petition's priority date.

The Director should request this evidence, and any other additional evidence considered pertinent to the new determination on the Petitioner's ability to pay the proffered wage, and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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