U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10041232

Date: AUG. 3, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as an accountant. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based 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 that the record did not establish that the Beneficiary met the experience requirements for the offered position as of the priority date.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter to the Director for further consideration and entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is October 11, 2017. *See* 8 C.F.R. § 204.5(d).

II. THE BENEFICIARY'S EXPERIENCE

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). Section H of the labor certification states that the offered position of accountant requires a bachelor's degree in accounting or business administration and 12 months of experience in the job offered. Experience in an alternate occupation is not acceptable.

The labor certification states that the Beneficiary qualifies for the offered job based on her full-time experience as an accountant with [redacted], in [redacted] Texas, from October 11, 2013, onward. Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3). In response to the Director's request for evidence dated August 26, 2019, the Petitioner submitted a letter dated September 10, 2019, from the COO of [redacted] stating that the Beneficiary worked as an accountant from October 11, 2013, to the date of the letter. The letter listed her duties. In response to a subsequent RFE, the Petitioner also submitted the Beneficiary's income tax returns; IRS Forms W-2, Wage and Tax Statements; pay stubs; and substantial employment documentation evidencing her employment with [redacted][2]

In his denial decision, the Director quoted a letter from the Petitioner's counsel in the record which stated that "the beneficiary's qualifying experience was gained solely from her present employer." He noted that the Petitioner answered "no" on the labor certification in response to question J.21, which asks whether the Beneficiary gained any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested. A labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience was in a job substantially different than the offered position or the employer demonstrates the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). The Director determined that the Beneficiary did not meet the experience requirement for the offered position because he apparently considered counsel's letter to indicate that the Beneficiary gained her qualifying experience working for the Petitioner, and not [redacted]

On appeal, the Petitioner asserts that it and [redacted] are separate entities with different employer identification numbers. The record supports these assertions. The Petitioner has established by a preponderance of the evidence that the Beneficiary gained over 12 months of qualifying experience as an accountant with a different employer. Therefore, it has established that the Beneficiary met the requirements for the offered position as of the priority date. We will therefore withdraw the Director's decision. However, for the reason discussed below, we will remand the matter to the Director.

[2] The Beneficiary was employed with [redacted] in H-1B nonimmigrant status.

III. ABILITY TO PAY

The record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage from the priority date on October 11, 2017, and continuing until the beneficiary obtains lawful permanent residence.[3] The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." The regulation further states that where the Petitioner employs 100 or more workers, "the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage."

The record contains the Petitioner's unaudited financial statements for 2017. However, where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, the financial statements must be audited. 8 C.F.R. § 204.5(g)(2). The unaudited financial statements are not regulatory-prescribed evidence of the Petitioner's ability to pay for 2017.

Further, the labor certification and petition indicate that the Petitioner has 120 employees. The record contains a letter dated September 23, 2019, from its administrator stating that it has the ability to pay the proffered wage to the Beneficiary. However, the letter was written nearly two years after the priority date; it does indicate the number of workers employed by the Petitioner; and it is not clear that the administrator is a financial officer of the Petitioner. Therefore, we decline to accept the letter from the administrator as evidence of the Petitioner's ability to pay the proffered wage from the priority date in 2017 onward.

The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2017. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

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

[3] The annual proffered wage is $52,811.