U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-H-C-P-, INC.

DATE: AUG. 10, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of healthcare staffing services, seeks to employ the Beneficiary as a registered nurse. It requests her classification under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a position requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the combined proffered wages of this and other petitions.

On appeal, the Petitioner submits additional evidence and asserts its ability to pay the combined proffered wages based on its beneficiaries' generation of income in excess of their wages. It also argues that it need not pay proffered wages until beneficiaries obtain lawful permanent resident status.

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. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a job in the United States with a foreign national, an employer must first obtain 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 then 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, the 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.

The DOL has determined that the United States lacks able, willing, qualified, and available nurses, and that employment of foreign nationals in this "Schedule A" occupation will not hurt the wages and

working conditions of U.S. workers with similar jobs. 20 C.F.R. § 656.5. Thus, the DOL has authorized USCIS to adjudicate labor certification applications for nurses. 20 C.F.R. § 656.15(a). USCIS therefore not only rules on this petition, but also on its accompanying labor certification application. *See* 20 C.F.R. § 656.15(e) (describing a labor certification determination by USCIS in a Schedule A case as "conclusive and final").

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its 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.*

Here, the labor certification application states the proffered wage of the offered position of registered nurse as $54,800 a year. As of the appeal's filing, however, required evidence of the Petitioner's ability to pay the proffered wage in 2017, the year of the petition's priority date, was not yet available.[2] The Director determined the Petitioner's ability to pay based on copies of its federal income tax returns for 2016.

Required evidence of the Petitioner's ability to pay in 2017 should now be available. We will therefore remand this matter. On remand, the Director should ask the Petitioner to submit copies of an annual report, federal income tax returns, or audited financial statements for 2017.

The Director should also remind the Petitioner that it must provide the receipt numbers, priority dates, and proffered wages of its other immigrant petitions that were pending or approved as of this petition's priority date of September 11, 2017, or submitted thereafter that year. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay combined proffered wages of multiple petitions).[3] In response to the Director's request for evidence (RFE), the Petitioner provided a list of other petitions. But the list lacked the petitions' proffered wages, preventing a determination of the Petitioner's ability to pay the petitions' combined wages. On remand, the Petitioner should provide the missing proffered wages. It may also submit additional evidence, including proof of its payment of wages to relevant beneficiaries and materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

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[1] This petition's priority date is September 11, 2017, the date of its filing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] On appeal, the Petitioner submits a copy of IRS Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, for 2017. This form, however, does not reflect the Petitioner's income or net current assets. It therefore does not constitute required evidence under 8 C.F.R. § 204.5(g)(2).

[3] The Petitioner need not provide information about petitions that were denied, withdrawn, or revoked without a pending appeal of motion. USCIS will also not require the Petitioner to demonstrate its ability to pay a proffered wage before a petition's priority date.

III. THE NOTICE OF FILING

Although unaddressed by the Director, the accompanying labor certification application does not merit approval. Unless a bargaining unit represents employees in an offered position, an employer seeking Schedule A designation must document its posting of a notice of the filing of the labor certification application to employees at the proposed worksite. 20 C.F.R. § 656.15(b)(2). The notice must include a position's rate of pay. 20 C.F.R. § 656.10(d)(6).

Here, the Petitioner's RFE response included a copy of a filing notice describing the position's rate of pay as $54,400 a year. As previously indicated, however, the labor certification application states the annual proffered wage as $54,800. Contrary to 20 C.F.R. § 656.10(d)(6), the notice does not accurately describe the position's rate of pay.

On remand, the Director should ask the Petitioner to submit evidence of its compliance with the filing notice requirements and afford it a reasonable opportunity to respond. Upon timely receipt of a response, the Director should review the entire record and enter a new decision.

IV. CONCLUSION

As of the appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage during the year of the petition's priority date was not yet available. The record also lacks evidence that the Petitioner properly notified employees of the filing of the labor certification application.

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

Cite as *Matter of A-H-C-P-, Inc.*, ID# 1676708 (AAO Aug. 10, 2018)