U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33385852

Date: AUG. 27, 2024

Appeal of Texas Service Center Decision

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

The Petitioner – a for-profit, Russian-language school – seeks to employ the Beneficiary as an e-learning coordinator. The school requests her classification under the employment-based, third-preference (EB-3) immigrant visa category as a "professional." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). Organizations may sponsor noncitizens for U.S. permanent residence in this category to work in jobs requiring at least bachelor's degrees. *Id.*

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 offered job's proffered wage. On appeal, the school contends that the Director misread and disregarded evidence.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we agree with the school that the Director misanalysed evidence. We will therefore withdraw the Director's decision. But, because the record lacks updated evidence of the Petitioner's ability to pay the proffered wage, we will remand the matter for entry of new decision consistent with the following analysis.

I. LAW

Immigration as a professional generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and a noncitizen's employment in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); 8 C.F.R. § 204.5(l)(3)(i). Among other things, USCIS determines whether a

noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(C).

Finally, if USCIS approves a petition, a beneficiary may 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. ANALYSIS

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 permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements.[1] *Id.*

When assessing 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* E.(4)(C)(1), www.uscis.gov/policy-manual. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the organization generated annual net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid to a beneficiary. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(2). If net income and net current assets are insufficient, USCIS 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); *see generally* 6 *USCIS Policy Manual* E.(4)(C)(3).[2]

The Petitioner's labor certification states the proffered wage of the offered job of e-learning coordinator as $49,795 a year. The petition's priority date is August 29, 2022, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

As of the petition's filing in December 2023, regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2023 was not yet available. Thus, for purposes of this decision, we will consider the school's ability to pay only in 2022, the year of the petition's priority date.

The record shows that the Petitioner has employed the Beneficiary since 2018. A copy of her IRS Form W-2, Wage and Tax Statement, indicates that, in 2022, the school paid her $55,193.11. That amount exceeds the annual proffered wage of $49,795. The Petitioner therefore demonstrated its ability to pay the offered job's proffered wage.[3] We will therefore withdraw the Director's contrary decision.

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[1] Although inapplicable here, petitioners that employ at least 100 people may submit statements from financial officers to demonstrate the organizations' ability to pay proffered wages. *See* 8 C.F.R. § 204.5(g)(2).

[2] 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); *Four Holes Land & Cattle, LLC v. Rodriguez*, No. 5:15-cv-03858, 2016 WL 4708715, **4-5 (D.S.C. Sep. 9, 2016).

[3] The Petitioner also submitted a copy of its 2022 federal income tax return, which reflected sufficient annual net income to pay the proffered wage.

The Petitioner has not submitted evidence of its ability to pay the proffered wage beyond 2022, the year of the petition's priority date. We will therefore remand the matter.

On remand, the Director should ask the Petitioner to submit regulatory required evidence of its ability to pay the proffered wage in 2023 and, if available, 2024. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay from a petition's priority date "continuing until the beneficiary obtains lawful permanent residence"). The school may also submit additional evidence of its ability to pay.

If supported by the record, the Director may notify the Petitioner of any additional potential denial grounds. The Director, however, must afford the Petitioner a reasonable opportunity to respond to all issues on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

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