U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 1825643

Date: AUG. 31, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, an operator of fast-food restaurants, seeks to employ the Beneficiary as a "combined food preparation and service worker." The company requests her classification under the third-preference, immigrant visa category for "other workers." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner didn't demonstrate its required ability to pay the combined proffered wages of this and other Form I-140 petitions the company filed.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (stating the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). 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

Immigration as an "other," or unskilled, worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position will not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved 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. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a designated noncitizen 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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). This petition's priority date is January 30, 2017, the date DOL received the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2).

In determining ability to pay, USCIS examines whether a petitioner annually paid a beneficiary the full proffered wage from the year of a petition's priority date onward. If a petitioner didn't annually pay the full proffered wage or didn't pay a beneficiary at all, 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. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

The accompanying labor certification states the proffered wage of the offered position of food preparation/service worker as $16,994 a year, or, based on a 40-hour work week, about $8.17 an hour.

The Form I-140 and the Beneficiary's resume indicates that she lives in Vietnam. The Petitioner does not claim to have ever employed her and did not provide evidence of any payments it made to her. Thus, based solely on wages paid, the Petitioner has not demonstrated its ability to pay the proffered wage.

At the time of the petition's filing in August 2017, financial evidence of the Petitioner's ability to pay the proffered wage was not yet available for 2017, the year of the petition's priority date. The Petitioner submitted copies of its audited financial statements for 2016 and 2015 and a copy of its federal income tax return for 2015. The company also provided a letter from its chief financial officer (CFO) stating the company's employment of more than 7,400 people and net income in 2016 exceeding $30 million.[2]

In a request for additional evidence (RFE), the Acting Director of the Texas Service Center notified the Petitioner that USCIS records show the company's filing of Form I-140 petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). This Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this petition and any others that were pending or approved as of this petition's priority date or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, at the time of the filing's grant, the petitioner did not demonstrate its ability to pay the combined

[1] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

[2] Because evidence indicates the Petitioner's employment of at least 100 people, the Director may accept the CFO's statement as proof of the company's ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2). The new decision should state whether the Director accepts the CFO's statement as proof and, if not, why not.

proffered wages of multiple petitions).[3] Thus, the RFE asked the Petitioner to provide additional evidence and information regarding its other Form I-140 petitions, including a list of its petitions filed "as of the priority date, and continuing until the date of this notice." As previously indicated, this petition's priority date is January 30, 2017. USCIS mailed the RFE on September 5, 2017.

The Petitioner's RFE response contained a list of 366 Forms I-140 the company filed, including this petition, and information about the filings.[4] The Director concluded that the company submitted "an incomplete list of filings." The decision states that the Petitioner's list includes the company's Form I-140 filings up to January 2017. But the decision suggests that the list and corresponding information omits about 130 petitions the Petitioner filed between the petition's priority date in January 2017 and the RFE's issuance in September 2017. Determining that the Petitioner omitted requested evidence, the Director found the record insufficient to demonstrate the company's ability to pay the combined proffered wages of all its applicable petitions.

As the Petitioner argues on appeal, however, the Director appears to have mistaken the priority dates of the petitions on the Petitioner's list for their dates of filing. The company's list reflects virtually all Form I-140 filings it made through September 5, 2017. USCIS records confirm the listed filings and show no others, except two that were denied and one that was withdrawn. Thus, the Director erred in finding that the Petitioner omitted requested evidence. We will therefore withdraw the Director's decision.

The Petitioner provided the proffered wages of its 366 petitions, totaling $6,397,537.80.[5] As previously indicated, the company's audited financial statements reflect net income of more than $30 million in 2016. The Petitioner therefore argues that it has demonstrated its ability to pay the combined proffered wages of this and its other applicable petitions.

Unless the Director accepts the CFO's statement, however, the record lacks regulatory required evidence of the Petitioner's ability to pay in 2017, the year of the petition's priority date, and thereafter. We will therefore remand the matter. On remand, if rejecting the CFO's statement, the Director should ask the Petitioner to submit copies of annual reports, federal tax returns, or audited financial statements for 2017, 2018, 2019, and 2020. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay from a petition's priority date "and continuing until the beneficiary obtains lawful permanent residence"). The Petitioner may also submit additional evidence of its ability to pay, including proof of any wages it paid applicable beneficiaries in relevant years and materials supporting the factors stated in *Sonegawa*. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

If supported by the record, the Director may notify the Petitioner of any additional potential grounds of denial. The Director, however, must afford the company a reasonable opportunity to respond to all

[3] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew, or, unless pending on appeal or motion, that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions or after the dates corresponding beneficiaries obtain lawful permanent residence.

[4] The Petitioner's list numbers 372 petitions. But the document lists the following six petitions twice: [redacted]; and [redacted]

[5] We subtracted the proffered wages of the six petitions that were listed twice.

issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

The Director erred in finding that the Petitioner omitted requested information about its other Form I-140 filings. Unless the Director accepts the CFO's statement, however, the record lacks updated evidence of the company's continuing ability to pay the combined proffered wages of this and its other applicable petitions.

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